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MISSISSIPPI LAW JOURNAL

JOURNAL of the STATE BAR ASSOCIATION

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HOPES OF THE NEW ADMINISTRATION

The hope of the present administration of the Mississippi State Bar Association is to see come to pass in the near future the building of a greater and more compact organization of the membership of the legal profession in this State.

The rank and file of the legal profession in the State of Mississippi consists, in round numbers, of about fourteen hundred licensed lawyers. The only organization to be found among this group of professional men, save a few scattered local associations, is a loosely knit state bar association which has absorbed only twenty or twenty-five per cent of the total number. This small percentage represents a bar of distinguished lawyers who love their profession and their State. Nevertheless, the fact is, the splendid men who constitute the present bar organization for the most part give it but scant thought and indifferent support. The profession in the State, as a whole, possesses great capacity for welding other groups of people into well organized bodies so that they are able to exert every ounce of power and strength the particular group is capable of exerting, yet strange to say when it comes to perfecting a like organization within their own ranks they work at it only in a very indifferent way.

Every other professional group in the State presents a close, compact working organization into which is thrown the enthusiasm and moral support of practically every individual of the group. By reason of the enthusiasm and backing given to such organization by a large percentage of its membership they have been able to accomplish much good within their own ranks and make great strides forward as a profession. Mark the almost marvelous advance in professional standing, learning and skill made by the medical profession within the last twenty years. No one

will question the assertion that much of this has been accomplished as a direct result of a compact organization and consistent team work. The same may be said of the other professions. If one will turn to the trades and callings in the State it is found that they have live and efficient organizations through which much is being accomplished. Even the great labor group through its splendid organization has been able to effectuate needed beneficial reforms.

There is serious question as to whether the legal profession has kept pace with the advance made by the other groups making up the body politic within the last quarter of a century. The law fixes today the same educational qualification for the lawyer it did more than a quarter of a century past. This is not true of any other single professional group in the commonwealth. In every direction one turns, the watchword and slogan of every organization is for raising the educational qualifications of the individual within that particular group. Strange as it may seem from our ranks alone, here and there, comes the cry that it is undemocratic for lawyers, for the legal profession, the leader of all the professions, to raise the standard of qualifications educationally. If the standard is not raised in keeping with the age in which we live can we expect the profession to retain its place of leadership among the other learned professions? Will it continue to be able to successfully discharge the manifold duties necessarily laid upon its shoulders in a government like ours?

In common with the other states of the Union, Mississippi has three great departments of government, the judicial, the legislative, and the executive. In round numbers we might say that fourteen hundred men, out of a population of over two million individuals, practically constitute, control and direct the destiny of one of these great departments—the judicial. At the same time this group of fourteen hundred wield a mighty influence in shaping and directing the policy of the other two departments.

The judicial is peculiarly the lawyers' department—our department. Here certainly we ought to put forth our best thought and all of our strength in order to meet the changed conditions of the civilization of today. Candidly, have we adjusted the sails of our department so that it will function successfully under the changed conditions which a radically different era is forcing upon us? Do we not use the sails of half a century ago; do we not trudge along in the same rut marked out by our fathers under conditions as different

from those of the present time as the night is from the day? In our department we witness ancient court machinery, the product of former times, harnessed up and made to do service in this age of wonderful progress and achievement in the world's history.

Where is the blame being placed for the inefficiency of our department of government? The answer is easy. It is placed at the doorsteps of the legal profession. The burden is justly ours and we cannot play the part of shirkers. If we, as a profession, do not remedy the existing evils in our own department, will not sooner or later untrained minds of other groups attempt to do the work which is for our hearts and minds alone to perform? If we as a profession are to successfully cope with the great task confronting us, we must, to start with, have an efficient organization composed of a large majority of our profession in the State—all of whom are keenly alive to the seriousness of the conditions now besetting our department. We cannot afford to settle ourselves back in our easy chairs lulled with the idea that the judicial machinery so admirably prepared in a former age and set in motion by such men as Lamar, George, Harris, Barksdale, Campbell, Fewell, Catchings, and many others of the host of mighty lawyers, who have now passed from the stage of action, will continue under changed conditions to run smoothly without effort on our part.

As great, if not greater problems, face us than those met and dealt with by the generations of lawyers now gone.

Again, the hope of the present administration of the Mississippi State Bar Association is to see come to pass in the near future the building of a greater and more compact organization of the members of our group; to see fostered and stimulated, through the agency of such an organization, a keener and more sensitive consciousness of the responsibility and obligations resting upon us individually as members of the legal profession, especially as members of our department of government, to the end that the administration of justice in the courts will be made more efficient and in keeping with the age in which we now live.

In order to assist in bringing the foregoing to pass it is hoped that the district meetings of lawyers, as adopted and outlined by the Association's executive committee, will be at once inaugurated whereby matters peculiar to, and of interest to each particular district, may be earnestly discussed around a luncheon table and at the same time a

more serious interest aroused in the work of the Association together with the problems now facing us as members of a great profession; the fostering of a state law journal which will courageously deal with matters of live and vital interest to the profession and which will be placed in the hands of every lawyer in the state; and reasonably necessary legislation to raise the standards of legal education in order that our profession may at least keep pace with the other learned professions.

To the attainment of these objectives the present administration seeks the active co-operation and sympathetic interest of the entire membership of the Bar in the State.

T. C. KIMBROUGH,
President Mississippi State Bar Association.

To the Members of the American Bar Association:

The annual meeting of the American Bar Association will be held in the city of Memphis on October 23rd, 24th and 25th, and it is the wish and desire of the President and Executive Committee that the attendance be the largest in the history of the Association.

A most cordial invitation is extended to the members to attend this meeting and it is the belief that if the members who are accustomed to attend the meetings of the Association will make the effort to urge their fellow members, who may be somewhat irregular in their attendance, to meet them in Memphis the wish and desire of the President and Executive Committee will be gratified.

Numerous interesting subjects will be presented for consideration and there are many important things that require the attention of the membership.

GURNEY E. NEWLIN,
President.

To the Bar of Mississippi and of the South:

The coming annual meeting of the American Bar Association in Memphis on October 23-25, next, will be the first held in the South since 1910, when it met in Chattanooga.

Those, who, on behalf of the Bar Association of Tennessee and the Memphis and Shelby County Bar Associations, extended the invitation earnestly urged that such meeting would kindle anew the ideals of the Bar of the South, revive the memories of the glorious achievements of its great lawyers, again consecrate it to high ethical standards—in short, be a great inspiration.

The Association heeded the appeal, and manifesting an intense interest in and deep consideration for the Bar of the South, accepted the invitation.

While the Memphis Bar is proud that the meeting will be held in its city, yet it feels that the Association is primarily coming to the "South" rather than to the city of Memphis.

The relationship between the bar of Memphis and the Bar of Mississippi has ever been such a close and friendly one that it is with especial warmth that the Bar Association of Tennessee and the Memphis and Shelby County Bar Associations extend to the Bar of Mississippi a cordial invitation to be present on that occasion and to join with the Bar of Memphis, of Tennessee and of the entire South in acting as host to the lawyers of the nation with truly Southern graciousness and hospitality.

BAR ASSOCIATION OF TENNESSEE,
W. E. NORVELL, JR., President.

MEMPHIS AND SHELBY COUNTY BAR ASSN.,
CHAS. N. BURCH, President.

ELIAS GATES, Chairman Executive Committee.
WALTER CHANDLER,
PHIL M. CANALE,
W. M. STANTON,
JNO. L. EXBY,
FRANK GILLILAND.

PROCEEDINGS

OF THE

Twenty-Fourth Annual Meeting

OF THE

Mississippi State Bar Association

HELD AT

CLARKSDALE, MISSISSIPPI

May 1st and 2nd

1 9 2 9

PROCEEDINGS OF THE TWENTY-FOURTH ANNUAL MEETING OF THE

MISSISSIPPI STATE BAR ASSOCIATION

PRESIDENT CURRIE: The Mississippi State Bar Association will come to order. I present the Honorable George F. Maynard, President of the Coahoma County Bar Association, who will preside.

We will now have the invocation by Dr. W. M. Bostick.

DR. W. M. BOSTICK: Oh, God, our Father, Thou who art the Great Law Giver and the Great Judge of mankind, into Thy presence we come this morning, to recognize that every good and perfect gift is of Thee; to recognize that all that we have in this life is from Thy hand. Thou hast made it possible for us to have government, civilization, good citizenship, justice to man, and we pray this morning, our Father, that in this first session of this Association, that every member may bow reverently before God, and seek His guidance and His leadership in this session, and in all the sessions that are to follow.

We thank Thee, our Father, for the large place that Thou dost give to man in this world to serve. We thank Thee for the field in which the lawyer serves, and we pray that Thou wilt help each one of these men in their community, the place where Thou hast erected them to serve faithfully and well. We thank Thee, our Father, for Thy Word, the revelation of Thyself to man, the great Guide Book not only to the preacher but to the attorney. We thank Thee for Thy Son, Jesus Christ, Who has been made our Great Attorney at the right hand of the Father, for Thou hast said in Thy Word that if we confess our sins, if we sin, we have an attorney with the Father.

We bless Thy name, our Father, for the dignity that Thou hast given to every calling in the world. We pray Thy

blessings upon this Association, and we pray that Thou wilt bless those who shall bring the addresses, and may such inspiration and information come that shall send every man back to his place determined to be a stronger and better man in God's place; for Jesus' sake we ask it, Amen.

HON. GEO. MAYNARD: Gentlemen, it is with great pleasure that I introduce to you as our vocal soloist this morning Mrs. J. A. Martin, Jr., who is well known for her singing and music, and Mrs. C. F. Baltzer, accompanist.

(Solo rendered by Mrs. Martin, accompanied by Mrs. Baltzer.)

HON. GEO. MAYNARD: We will now have the welcome address of the Bar Association by Mr. Gerald Fitzgerald.

HON. GERALD FITZGERALD: Mr. Chairman, Mr. President, members of the State Bar Association, distinguished guests, ladies and gentlemen: I always knew that the lawyers were in the right, but I did not know that they were always on the right. It seems that all the lawyers this morning have occupied the side of the sheep and not the goats, and a few that came in late were compelled to get on this side.

Because the Mayor of Clarksdale is not here this morning—I suppose he must have been detained by some misfortune—you must not think that the people of Clarksdale are not also welcoming you royally, as the Bar is also. I want to extend to you on behalf of the Coahoma County Bar Association a very hearty and cordial greeting and welcome to Clarksdale. We pride ourselves on being somewhat of a convention city in Clarksdale. We have entertained many distinguished guests, many conventions of distinguished men, but I believe that it has been nine years since we have had the honor and pleasure of having quite this distinguished body with us, and we hope that you have in your minds, those of you who were here before, a lingering memory of the hospitality which we extended to you then, which made you at the last session accept the invitation which we heartily extended to you to come here.

I have no intention at all of making any speech whatever. The speech of the occasion, of course, will be made by the Honorable President of this Association. But I may be pardoned if I do for a moment go back to the position which the Bar and the members of the Bar of the United States have occupied, and the position which this noble profession that you represent has occupied in the annals of men. It seems that the general public, although

they shower us with honor, although they give us every confidence, although personally we are beloved of them, that they have always made jokes about us as they made jokes about the mothers-in-law and all those things. But I think that our profession has vindicated itself, and I think that during all the history of this, the greatest of all republics, the lawyers have occupied a position of trust and confidence and have carried that trust out fully. Although our country itself and our freedom was won by the sword, the Continental Congress, which was composed mostly of lawyers, was the real inspiration for the patriotism and the bravery of those men. Those lawyers there at that time promulgated those two great instruments which have been our source of pride, and one of them Gladstone said was the greatest instrument that ever sprang from the brain of men at one time; that was the Constitution of the United States. And so I say from that time on down through the history of the United States, this, the greatest of all republics in the world, the lawyers have largely predominated, and the strength, of this republic, its power, its progress have been demonstrated and have shown that the lawyers themselves are carrying out the trust that has been reposed in them. But of this large galaxy of stars, Mississippi has always contributed her quota of luminants. Mississippi has within her borders today men of as great legal learning, of as great ability as the nation can furnish, and we personally, the members of the Coahoma County Bar are very proud indeed to have you as fit representatives of this noble profession to be here with us and to let us introduce you to our home people as fit representatives and as the type of men that we claim to be, to make up the noblest of professions.

You know it is a great thing to have a convention of this kind to meet together. It is a wonderful thing for us to have you in our homes. In the olden days when they broke bread and took salt they were taken into the heart, they were made a member of the tribe that no indignity might be brought to them, but on the other hand they were showered with love and affection and in those homes they were considered worthy guests. We hope that when you come here with us at this time and mingle with us in our homes and break bread with us and take salt with us that that relation may exist between you and us, and that you shall be our honored guests. We are glad to have you and to extend a welcome to you. (Applause.)

HON. GEO. MAYNARD: I cannot explain to the audience why Mr. Ross is not here. He expected to be here. I want to say, though, on behalf of the city and on behalf of Mr. Ross, that Clarksdale is always glad to have the State Bar Association here with us. We gave them a warm welcome in 1918, and you who are here remember that we did give you a good time, and we hope to do so now. On behalf of Mr. Ross I will say that the keys of the city are in your hands, and the city will do all it can to make your visit here pleasant, those who have recollections of it, that it will be pleasant to remember.

Now, Clarksdale is a growing city, and we citizens feel proud of our city, and as Mr. Fitzgerald has said, it is becoming a convention city. That is because these people here are cordial and warm hearted and are glad always to entertain those who attend these conventions.

Now, one of the best features that we have to offer you on the visit here, outside of the banquet which shall be given, of course, by the president of the State Bar Association, is a trip to Moon Lake tomorrow afternoon. We will show you one of the most beautiful lakes to be found anywhere, and we hope all of you who can will go. I thank you for your attention. (Applause.)

We now have the pleasure of presenting to you the Honorable Bidwell Adam—pardon me, Mr. Ross, come up here and make your talk. (Applause.)

MAYOR L. A. ROSS: Mr. Chairman, ladies and gentlemen, we are mighty glad to have you all with us. I think this really the most distinguished assemblage of guests we have had since I have been mayor. (Applause.) And we are going to do our best to show you that we appreciate you all coming to our city. While here in our town you will find a fine, clever city, with the exception of our police department. They are just a little bit blind and a little bit hard of hearing. (Laughter and applause.) If there is anything you want, we refer you to some member of the Bar, and I am sure they will be able to attend to any wants that you might need. On behalf of the city and the Bar, I welcome you to our town. (Applause.)

HON. GEO. MAYNARD: There is an old saying, "Better late than never." I will say to Mr. Ross I tried to make his speech for him, and I felt very glad you came in to redeem the day.

We now have the pleasure of introducing to you our Honorable Lieutenant Governor, who will make the re-

sponse to the address of welcome, Honorable Bidwell Adam. (Applause.)

LIEUTENANT GOVERNOR BIDWELL ADAM: Mr. Chairman, Mr. President, ladies and gentlemen, and members of the Bar:

I wish that I could express myself to you as clearly, and cover as correctly the situation, as did your distinguished mayor of Clarksdale. It was rather amusing to me when he made reference to the police force of Clarksdale being blind, at least temporarily, because I was very much impressed with the idea and thought that a year ago, when your Clarksdale crowd came to Gulfport, they found the police department of that city suffering with the same infirmity.

We lawyers of Mississippi want you to know that we are glad to come to this, your city and your home here in Clarksdale, a city of fame and fortune, a city of culture and refinement, a city of ideals and dreams, a city of love and romance, a city of history, a city whose proud history reflects the greatness of your men and the beauty of your women, and we know today that we are welcome, because we feel that your every heart throb bids us a kind and happy stay in your midst. We know today that your city has lawyers that have come to it from almost every hill and every vale of our old Magnolia State, and in coming to Clarksdale, we know that we visit a section of our great State that has been put through the fiery test of time and trouble.

Only two years ago I came to this proud city with a trainload of boats bound for the Choctaw and Shaw base. That was when the appeal was sent out and broadcast throughout Mississippi and other states, telling of the dreadful news and informing our people that the levee at Stop's Landing had broken and the mad and mean mighty waters of the Mississippi were crawling over its yellow banks and fast failing walls, leaving in its track disaster, disease and trouble for our people. It was then that I saw with pity the look upon the faces of the men and women of the Delta, as with heads erect they watched their farms and their fields, and some of them, their homes, washed almost literally away. But you could see more than that in the faces of these great men and women, because there was visible a grim determination not to stop and not to weaken under what seemed certain ruin, but rather the spirit of courage urged them to carry on. We of other sections of

your state could understand that you people had heretofore been put through a like test, and as history clearly informs us, with renewed energy, came back, a stronger race; and today it is gratifying to return to the great Delta section and see upon the faces of your men and women a look of satisfaction, a look of happiness, yes, pleasure and contentment is now written in the lines of your faces where heretofore despair was manifest. True to the traditions of your ancestors, you have again proven beyond a doubt the mettle of which you are made.

It is true that today we did not come here to especially pay compliments to the splendid citizens of this wonderful section of our great State, but I think it only proper that we, as fellow Mississippians, might be permitted to digress just a little and talk briefly about those things in which we have a common interest and feel a common touch. It has once been said that the more we understand one another, the more we will love one another. That is true today as it was when it was first uttered.

I appreciate the part assigned to me to play in this, the great convention of our State Bar in your city, and I say to you the lawyers of Mississippi are proud and happy to come to Clarksdale, they are grateful to you for the warm reception that you have already tendered in advance, for the many acts of kindness and the courteous treatment that your every citizen is showering upon us. This city has long been famous for the genius and courage of its people. Its patriotism has been tested in every bloody conflict in which this State and Republic participated, and here let it be said to her credit, she has given each time her full measure of men and might. With a generous heart she has contributed more than her share. The deeds of her sons and daughters have punctuated the history of her state, and when we speak today of her daughters, we speak of her splendid and refined womanhood, and I think it always proper, and I have been so taught, to put woman in her rightful and proper place, and let her occupy that exalted position that God Almighty intended that she should, and at that shrine of worship I am privileged to participate, and in doing so, I want to remind you with this splendid tribute the poet gave in eulogizing womanhood:

"Oh, woman, in this world of ours,
What boon can be compared to thee?
How slow we drag life's weary hours,

Even though man's proud brow were wreathed with flowers,
And his the wealth of land and sea,
If destined to live alone and never call a woman's heart his own;
Ah, woman's love is free from guile,
As pure as bright Aurora's rays;
The heart will melt beneath her smile,
And base born passion fade away;
Were I monarch of all the earth and of the swelling sea,
I would not estimate their worth, dear woman, one-half the price of thee."

Now, in conclusion, ladies and gentlemen of Clarksdale, again I want to say to you that the members of the Mississippi Bar are happy to come to your city; they are grateful to you for the kind invitation and have accepted it in a spirit of sincerity, and today and tomorrow want to mingle with you and to break bread across the board with your great people.

Again I say to you, we are happy and glad to come to Clarksdale. (Applause.)

HON. GEO. MAYNARD: We are happy to have as the next soloist, Miss Inez Payne, and I am glad to introduce her to you, and her accompanist, Mrs. E. H. Sample.

(Solo rendered by Miss Inez Payne, accompanied by Mrs. E. H. Sample.)

HON. GEO. MAYNARD: I am now going to turn the convention over to the Honorable George W. Currie, President of the State Bar Association, who will address you. (Great applause.)

PRESIDENT CURRIE: Mr. Chairman, members of the Bar, ladies and gentlemen, I think before I start to say anything, I see that I have an hour and forty minutes, I will find out if there are any visiting lawyers here, any lawyers from out of Mississippi, members of bar associations of other states or other jurisdictions. Have we any visitors with us? If visitors come in—we will expect distinguished visitors from other states—I would like for the lawyers to introduce them at any time; we will take time for that on any occasion.

It seems to be the custom for the president of the Bar Association to make an address, and I believe the by-laws require it to be read. Some of them may occasionally ask leave to print, so if I can not keep you here until I get through, I will ask the same privilege.

ADDRESS

GEORGE W. CURRIE, *President*

Mississippi State Bar Association, Twenty-fourth Annual Meeting, Clarksdale, Mississippi, May 1st, 1929.

Article XII of our Constitution provides for an opening address communicating the most noteworthy changes of general interest in the statutes of the State and of the Nation. At the meeting in Gulfport last year, the Article was amended so as to permit the President to speak upon such matters of current interest as he may deem of value to the Association.

Since our last meeting, the Federal Congress has enacted several laws of general interest to Mississippi. It is not my purpose to analyze or digest these Federal statutes. I call attention to the following as being among the most noteworthy:

S. 3776. An Act to authorize Secretary of Interior to issue patents for lands held under color of title.

H. R. 14130. An Act to amend Sec. 279 of Judicial Code so that writs of venire facias may be served by registered mail, etc.

S. 1731. An Act to provide for further developments of Vocational Education in the States and Territories.

H. J. Res. 340. To authorize Secretary of Treasury to cooperate with other relief creditors in making it possible for Austria to float a loan.

H. J. Res. 352. For relief of Porto Rico after hurricane.

S. J. Res. 5. Relating to immigration of certain relatives of United States citizens.

S. 3740. For the control of floods on Mississippi River.

S. 1341. Federal aid for highways.

S. 3556. Reforestation.

H. R. 9495. Federal aid in agricultural extension work.

H. R. 12821. Additional hospitals for war veterans.

H. R. 13446. Amend National Defense Act.

H. R. 7373. Electors of President and Vice President meeting and transmission of certificates.

H. R. 10487. To amend World War Adjusted Compensation Act.

H. R. 13039. To amend World War Veterans Act 1924.

H. R. 13621. Supplement to Code of U. S.

S. 2901. Amendment to National Prohibition Act—Jones Law.

Probably the most important of these enactments to us are the Acts regarding Vocational Education, which is S. B. 1731; S. B. 3740, for control of floods on Mississippi River, and S. B. 1341 respecting Federal aid for highways. They evidence an important trend in statutory enactment.

The recent amendment to the National Prohibition Act known as the Jones Law, under which Federal Judges in their discretion, may impose sentences of five years and a fine of $10,000.00, presents an interesting phase of legislation.

The extraordinary session of the Mississippi Legislature passed many laws of general importance. Among them may be mentioned the following:

H. B. 69. An Act to appropriate $656,533.13 to pay interest on bonds from August 1, 1928 to January 1, 1930, where adequate appropriation was not made at regular 1928 session.

S. B. 78. An Act making appropriation for salary and expenses of Code Commission.

S. B. 19. An Act amending Sec. 4, Ch. 119, Laws of 1926, apportioning the excise tax of 5c per gallon on gasoline to the highway department and counties.

H. B. 21. An Act amending sections of Code so as to change the lien date of taxes from February 1st to January 1st.

H. B. 50. An Act amending Sec. 1, Ch. 87, Laws of 1928, fixing commission of sheriffs and tax collectors and fixing time at which commission in excess of one per cent may be collectible.

S. B. 253. An Act amending Sec. 1, Ch. 120, Laws of 1928, so as to increase tax on trucks and trailers on public roads and reduce the passenger tax on busses.

H. B. 15. An Act imposing an excise tax on the business of receiving, selling or distributing gasoline in State for use by persons in motor vehicles upon highways and streets and repealing Ch. 198, Laws of 1928, and all laws in conflict herewith.

H. B. 178. An Act amending Ch. 180, Laws of 1924, so as to require all common carriers in Mississippi to render monthly reports to State Auditor showing the number of gallons of gasoline delivered by them at points of ultimate destination, instead of quarterly as now provided.

H. B. 264. An Act amending Sec. 4, 14, 24, 25 and 27, Ch. 132, Laws of 1924, providing revenue for general funds of State, providing for the determination of taxes due, for the levying, assessment, collection and payment of taxes due.

S. B. 118. An Act amending Sec. 16 and 23, Ch. 134, Laws of 1924, so as to provide for prompt payment of tax collected into State treasury and for the collection thereof without commissions being deducted.

S. B. 52. An Act providing for the establishment and maintenance and administration of orphanage public schools in the State.

S. B. 170. An Act requiring highway commissioners to take oath of office and give bond.

S. B. 79. An Act to provide office supplies, equipment and additional clerical help for code commissioners.

S. B. 63. An Act creating a State Board of Professional Engineers.

H. B. 72. An Act amending Ch. 100, Laws of 1928, so as to make additional exemptions of new factories and enterprises of public utilities from taxation.

S. B. 58. An Act providing that Boards of Supervisors may purchase after legal advertisement, trucks, tractors, motor vehicles and road building equipment upon partial payment plan.

S. B. 40. An Act amending Ch. 219, Laws of 1928, so as to provide for same amount of costs in cases tried in the County Court, of which the Justices of Peace have concurrent jurisdiction, as are allowed in Justice Court, and fixing the compensation of stenographer of County Court.

H. B. 99. An Act repealing that part of Ch. 308, Laws of 1924, and all other laws conflicting with this act, which provides for the regulation of admission of patients to Sanatorium at Magee.

H. B. 107. An Act amending Sec. 2, Laws of 1926, Ch. 286, and other conflicting laws, so as to permit the State Tax Collector to make demands upon and file suit against fiscal officers within six years from the time that the cause of action accrues, and fixing compensation therefor.

S. B. 54. An Act fixing the term of elective municipal officers under commission form of government for a term of four years.

H. B. 281. An Act requiring sheriffs and tax collectors to make detailed annual reports of compensation accruing from all sources to his office, and of expenses of office.

S. B. 150. An Act authorizing the appointment of special judges and chancellors to perform all duties thereof during disability of any judge or chancellor.

H. B. 91. An Act making desertion and non-support of children under age of sixteen by a parent, a felony.

S. B. 142. An Act authorizing municipalities having a commission form of government, with a total population of 15,000, to issue funding bonds to take up warrants.

H. B. 269. An Act authorizing the organization of drainage districts.

My distinguished predecessor, in his annual address at Gulfport, called attention to the activities of the Association in respect to the Law School at Oxford. I suggest the subject again in order not merely to emphasize the splendid work of his administration toward our University Law School, but in order to accentuate the interest of the members of our Association in the continued support of the institution.

It was my great pleasure to visit the University, according to custom, and to make some remarks to the students of the Law School at the Annual Home-Coming Day. The University was then and is now engaged in active construction of new buildings and enlarged facilities for the Law School. Many prominent lawyers of the State were there and it is suggested that this annual occasion, not only by an address from the President of the Association, but by the attendance of many of its members, would become increasingly helpful not only to the students in the Law School, but to the Association as well. Many Mississippi lawyers

who have gone to other states, would, no doubt, return upon such an occasion. I believe our Association should constantly maintain a lively interest in our State Law School in order that the opportunities afforded there to the students of Law may be unexcelled. Remarkable work has been done by an efficient and devoted faculty, but the jurisprudence of Mississippi should not suffer for the want of whatever contribution interest and money can make toward better preparation of the lawyers of tomorrow.

We are delighted to have with us so many of the Law students and it is pleasing that representatives of the University and of the Law School appear on our program. The lawyers of Mississippi should constantly nurture the only Law School within our borders so that opportunities of professional preparation may not be surpassed in the nation.

With the approval of the Executive Committee, the subject assigned for the prize offered members of the University Law School is "To What Extent Does the Constitution of the United States Authorize the Courts to Review the Decisions of Administrative Tribunals?"

As provided in the by-laws, all regular and standing committees were promptly appointed. I take this occasion to express deepest gratitude to the chairmen and every member of all our committees, as well as to the membership at large, for their uniform cordiality and for their unstinted co-operation during the year.

I regret to report that our regular Grievance Committee has had a number of complaints, many of which have been adjusted satisfactorily. It is to be regretted that circumstances necessitated the appointment of two special Grievance Committees, both of which have faithfully and diligently engaged themselves about the performance of their unpleasant duties.

A special committee on Rule Making Power of the Courts was appointed, consisting of W. H. Watkins, chairman; J. N. Flowers, E. C. Sharp, Jeff Collins, Moncure Dabney and Charles S. Shannon, at the request of Hon. Josiah Marvel, chairman of this Committee for the American Bar Association, and who is our welcome and distinguished guest on this occasion.

Hon. J. L. Taylor, of Gulfport, was named as a special committee to represent our Association at public exercises held in Gulfport in memory of Hon. W. H. Hardy, one of the pioneer builders of South Mississippi and a distinguished member of this Association, and who long occupied the Circuit Court bench.

A committee consisting of W. S. Welch, A. B. Butts and Garner Green, was appointed to represent our Association at the meeting of the American Academy of Political and Social Science in Philadelphia.

J. Morgan Stevens, chairman of our State Code Commission, has been appointed as a special representative of the Associa-

tion, to attend the meeting of the American Law Institute in Washington.

Our Association at Gulfport authorized the appointment of an Annual Memorial Committee, charged with the duty of requesting our Supreme Court to set apart the first day of its September term in each year as a Memorial to our deceased brethren. This committee consisted of Ackland H. Jones, chairman; Marcellus Green and Robert H. Thompson. The Court very graciously yielded to the request of our committee, and while its chairman will present the report, I can not refrain from saying that a most interesting service was held and I commend to the recollection of the members of the Bar this recurring anniversary as a tribute of friendship to our departed brethren.

Our immediate past President recommended and our Association at Gulfport resolved that the Mississippi Law Journal should be established. It was provided that the Executive Committee of the Bar Association should be ex-officio members of a committee to serve in conjunction with Dean Kimbrough of the Law School, who should be chairman of the committee that would have charge of the publication. The amount of the annual subscription and other details were left to the committee, though it was contemplated that the annual proceedings of the Bar Association should be published in one of the quarterly numbers of the magazine. Under the direction of the Advisory Committee, a student board was appointed. It gives me great pleasure to report the successful launching of the Mississippi Law Journal and to pay tribute of appreciation to the untiring efforts of Judge Kimbrough and of the student board composed of young men in the Law School at Oxford. In order that the Association may have a better view of the work they have done, and their plans and hopes for the future, we are to have the pleasure of hearing from Dugas Shands, editor, and H. Edwin White, business manager of the Journal, as well as Chas. Scott Sykes, President of the Law School. The genial Dean of our Law School and his corps of earnest students have no compensation for their labors except the appreciation of the members of the Association, which is gladly and freely extended. It is to be hoped that the columns of the Journal will be used by the members in order to solidify their purposes and to enhance the continuity of our work. Many interesting general articles have appeared in its pages during its brief existence. The Mississippi annotations to the work of the American Law Institute, prepared under the direction of Judge Sydney Smith, are thoroughly practical and of inestimable value to lawyers who practice in our State. The Journal is yours and those who are in charge of it covet your constructive suggestions.

It is recommended that every member of the Association may become a subscriber to the Journal and so insure its perpetuity. At present, practically $1.00 per member is used in paying for

the publication of the minutes of our meeting. A subscription of $3.00 is remarkably low.

In accordance with a resolution of our Association at Gulfport, a committee consisting of two members from each Congressional District, a total of sixteen, was appointed as a Law Revision Committee. The committee consists of J. W. Dulaney, chairman; D. W. Houston, W. C. Adams, Herbert H. Holmes, William Hemingway, Lake Robertson, A. T. Stovall, R. F. Kimmons, C. C. Miller, A. S. Bozeman, Ellis B. Cooper, T. C. Hannah, T. Brady, Jr.; R. L. McLaurin, Paul Chambers and Thomas Fite Payne. The chairman has been exceedingly faithful and efficient and I believe all members of this committee have unselfishly contributed of their time and effort toward the work of this important committee. It is recommended that a similar committee be continued, particularly, pending preparation and adoption of a new Code. Probably no more constructive contribution could be made to the Jurisprudence of our State than for our Association to foster the permanent establishment of a Judicial or Law Revision Committee or Department. Several progressive states have established committees or commissions for the continuous study of statutory law in order that its symmetry may be maintained. Such a commission is expected to study all general statutes, as well as opinions of the Supreme Court, and to prepare prior to the convening of each session of the Legislature a report specifying such statutes as may be conflicting, indefinite, unconstitutional, or which for any reason may tend to complicate the administration of justice. It would also be the prerogative of such a commission to make forward and constructive suggestions with respect to emendation of the law and to draft such proposed new laws as it might submit, as well as such as might be referred to it by the Legislature. The present plethora of statutory enactments, whether induced by ambition for noble experimentation, or as a panacea for real or imagined defects in the law, makes it impossible for honest business to stabilize its processes or for trained and studious lawyers to reach a comfortable conclusion about many of our most important questions. Such a commission ought to go far toward remedying the present uncertainties of construction.

Our Association at Gulfport authorized appointment of a Code Committee to co-operate with the State Code Commission. Messrs. Jno. Brunini, chairman; Lester C. Fant, J. M. Thomas, E. J. Ford and Francis S. Harmon form this committee. They have unselfishly and efficiently performed the duties of their position. We have the pleasant anticipation of hearing from the Code Commission at this meeting of our Association. No more important work confronts the people of Mississippi than the drafting of this new Code. Our State is fortunate in the able and efficient personnel of our Code Commission.

The enormity of the work to be done can hardly be contemplated unless special study of the subject has been made. It would appear to be difficult, if not impossible, to produce a modern, efficient Code for our State within the period allotted and only by the utmost co-operation by every element of our people, can our Code Commission complete the momentous work entrusted to it. The policy of our law makers in providing for the expenses of the Commission, and their unanimity in facilitating their work, merit the commendation of all patriotic citizens. The people of Mississippi, and particularly the members of our Association, should yield their utmost endeavor toward the successful consummation of this work and should ever be ready to co-operate with the suggestions of the Code Commission. The facilities of our Association have been at the call of this Commission. Its work is emphasized as affording probably the most constructive opportunity for service to our State which lawyers of the present decade will enjoy. Many years will elapse before another Mississippi Code is required.

The Executive Committee has held two meetings during the year and various interchanges of correspondence. The Executive Committee decided to recommend to the Association that a committee be appointed to draw up a schedule of uniform fees to be adopted by the Association. It appeared that lawyers are not only poorly compensated at best, but that our towns, cities and communities have no general standard of fees. The question appeared to the committee to be important and the subject is recommended for consideration and for action.

The Executive Committee fully discussed ways and means for enlarging the membership and increasing the enthusiasm of the members of the Association, in addition to a standardization of compensation. It appeared to the committee that a grouping of the counties throughout the State for the purpose of forming districts in order to hold group meetings, would greatly accelerate the work of the Association. The President and Secretary were requested to prepare a tentative draft of such grouping for submission to the Association and for reference to such Committee as the Association may intrust with the formation of districts. Such group meetings have been found very useful in other fields of endeavor and such a course is recommended to this Association.

It will be observed that our program contemplates a round table discussion, when such practical matters as have been indicated, may be freely presented to the Association.

It may be questioned whether two days is a sufficient period of time for the transaction of such business as should address itself to our Association, and I commend to the serious consideration of our members whether or not our session should last three days.

Observation during the year prompts the urgent recommendation that an enthusiastic program be adopted in order to en-

large the membership and the financial support of our Association, so that the continuity of the work may be preserved. There are approximately 1100 lawyers in Mississippi. The active membership of the Bar Association comprises rarely more than 300. There is a good deal of change in the membership. It appears that lawyers residing in the immediate section of the annual meeting usually attend and pay their dues, but in many instances members in remote parts of the State fail to pay or to avail themselves of the annual meetings. To a large extent, each annual meeting is, therefore, a new organization and much of the momentum of preceding activities is thereby lost. There are probably 125,000 lawyers in the United States and probably not exceeding 6,000 active members of the American Bar Association, and not more than one-third of the active membership usually attends its important sessions. It is conservative to say that not exceeding 20% of the lawyers in the United States are actively connected with any State or National Bar Association.

It is delightfully pleasant for our members to meet annually and to interchange the "sunshine of love and the moonshine of friendship." Nevertheless, the serious obligations of our profession should inspire us to the utmost efficiency in the use of so valuable an agency as our Association. In this day of rapid transit, when so many relationships engage the attention of our members and when the multiplied means of entertainment and enlightenment so absorb our minds, it is impossible to preserve a fully functioning organization without that eternal vigilance which is everywhere the price of success. The staid conservatism of lawyers has possibly denied our co-operative movements some of the publicity which in this age seems to be necessary. Constant correspondence and frequent travel on the part of active officers of the Association would greatly enhance interest among the members. Enlarged membership would, of course, enhance our financial resources. There is an inspiration in numbers and there is a stability in a comfortable financial budget, without which our Association may not attain its highest purposes. Such visits and correspondence would probably augment interest in local bar associations in cities and populous communities of our State. The scant funds of our Association afford practically nothing for intensive correspondence or for visits of officers or committeemen.

It is indicated that lawyers as a class are more poorly compensated than members of any of the other so-called learned professions. It is well known that lawyers appear to attend to the business of every one except themselves. It has been reliably stated that 25% of the lawyers of America transact three-fourths of its legal business.

Our custom of selecting a Secretary who is an active lawyer and who in every instance has rendered remarkable service considering the paltriness of his compensation, makes it impossible

to maintain a lively contact between the organization and the membership. It is suggested that a paid executive secretary, or a paid assistant secretary for at least a part of each year, would yield fine returns. For a few months in each year, such a young man, by visiting the lawyers of the State, individually, could, no doubt, obtain many new members for the Association. It has been exceedingly manifest that even our Executive Committee has not been able to meet as often as the needs of the Association indicate on account of the limited funds at our disposal. It is suggested that the Association initate and progress an active program for the enlargement of our membership and the increase of our financial support, for without these fundamentals, a large constructive work would appear to be impossible.

It is respectfully suggested that our courts and all other public tribunals recess each year during the meeting of the Bar Association in order that every member of our bench and bar may be free to attend.

It should be considered whether membership in the Bar Association should not be a requisite for admission to the Bar. Some states are apparently succeeding admirably with such a plan.

It should further be considered whether our Association as a corporate entity, should have the power to prescribe the ethics and enforce the discipline sometimes necessary for the preservation of the high standards of our profession.

It is a source of much gratification and should lend quickened impetus to our work to know that for the first time in its history the American Bar Association will meet in the far South at Memphis, Tennessee, October 23, 1929. It is urged that every eligible lawyer of Mississippi make application to join the American Bar Association prior to its convention in Memphis, and that all our lawyers, if possible, attend its sessions. The dues of $8.00 per year are exceedingly moderate. The American Bar Journal constantly contains lasting contributions to legal literature, which are worth the perusal of every sincere lawyer. No more inspirational meeting could attract an American lawyer than a session of our National Association, where are gathered 2,000 or more of the leading lawyers of the world. Probably no other convention on earth annually assembles so much of character and ability. One of the most heartening evidences of Southern recognition and progress is the meeting of this great Association in our midst. The American Bar Association is sponsoring radio programs each week in an effort to give the people of America a closer knowledge of the purposes of the Association and of the laws of our country. Its president, Hon. Gurney E. Newlin, of Los Angeles, has extended a most cordial invitation to join the Association to all young lawyers.

The lawyers of Mississippi, in common with those of the Nation, are confronted with many perplexing problems. Probably,

our own indifference, with that of the best citizens, contributes most largely to many governmental inefficiencies. Gladstone, England's great Prime Minister, lamented that the indifference of many of the best people accounted for most of the ills of government. The venerable Chief Justice of the United States is quoted as having said that "the administration of criminal law in America is a disgrace to the nation." President Wilson inquired, "What has become of the withering lie of general practitioners who once furnished our statesmen?" The Economic League, composed of probably five thousand representative citizens of the nation, recently voted that the administration of justice is the most serious question before us today. Our recently inaugurated President, himself a layman, devoted the most important parts of his address to the administration of justice. Many inherent difficulties of law administration can never be removed, and yet, much remains to be done. As D'Israeli remarked, "We ought to be conservative enough to retain all that is good in our system of laws and radical enough to discard all that is evil." Such should be the conscious obligation of members of our profession. Inefficiencies in jury trials, for instance, present defects which may never be fully eradicated. Once juries were selected as experts, because of their specialized acquaintance with the facts. It may be questioned now if many lawyers do not require juries who have no acquaintance with the facts of the particular case or intelligent knowledge of any other facts. There is a great deal of criticism, however, both of juries, judges and lawyers, appearing in the public press and otherwise, for which lawyers are probably not accountable. All too many citizens absent themselves from court and particularly from jury duty, unless some selfish or sensational case is in progress, assigning their own business or personal concerns as a legitimate reason for leaving the administration of justice to others. Probably for the first time in the history of the world, American business is establishing a code of ethics and is becoming a moral force in the affairs of the world. When the citizenship of our country recognizes that much of the deficiency in the administration of justice is due to the absence of sane, intelligent public contribution thereto, and arouses a sense of obligation on the part of the people, it will do much to lessen the inabilities of our courts. There is a murmuring consciousness that something seems to be lacking in our administration of justice and yet, the causes and the remedies do not seem to have been identified by the mass of our people. Some states have seriously considered the abolition of jury trials and others have resorted to special verdicts. It may be suggested as settled that in a democratic country, where the people contribute not merely to the powers that govern, but to the actual administration of law, jury trials will forever remain as an integral part of our judiciary system. It should, therefore, concern lawyers to see that the character and intelligence of juries are elevated. Sane, practical educa-

tion, both in schools and from the bench, with an added note of authority from our judges in refusing to accord easy exemptions from jury service may do much toward remedying this evil. It may be wondered whether our people, including lawyers and juries, do not regard a court trial too often as a game of chance or skill. The American press and public appear increasingly to regard court trials as arenas for public entertainment or for the delectation of those who enjoy the salacious the or the sensational. An individual consciousness of solemn responsibility on the part of every lawyer and a full realization that he is not concerned in winning verdicts or victories, but in seeing that justice is done and that truth is the goal, will largely lessen the wagering hazards of litigation and will contribute much to the public respect in which every process in a trial should be held. Causes on trial, however trivial, are not theatricals, but they are human interest tragedies which ought to inspire the sincerest professional integrity and the highest form of professional honesty.

Since the World War reliable figures indicate that single American cities furnish more statistics of violent crime than the entire British Isles or the Dominion of Canada. The capital city of England furnishes only four per cent of the criminal record of some of our great cities. Violent crimes among our youth and the currently reported revolt against authority sometimes said to have commenced at the termination of the World War, must give pause and sober contemplation to patriotic leaders who are interested in the perpetuity of our government. Many writers ascribe the prevalence of crime and the somewhat extended disregard for law and courts to the aftermath of the World War. Senator Beveridge, a few years ago, eloquently, yet solemnly, demonstrated that other causes are involved and that neither England, Germany nor France, although subjected to the horrors of war, had suffered from any decline in the enforcement or the observance of law. It must be recognized that the absence of much of the ancient sanction and majesty of the law accounts for many of our present ills. The forces of disorder and destruction seem to be organized. Probably not over ten per cent of our people are destructionists, and yet, the unorganized mass suffer from this militant minority. Our Constitution and the spirit of our laws zealously guard the rights of the minority. Reforms of procedure are, therefore, difficult under our system of government. It may be wondered how far free democracy in America may progress with safety to our Constitution, unless synchronized with sane and intelligent education and a revival of spirituality. The first ten amendments to our Constitution, some times called an American bill of rights, are declaratory of the Constitution and probably add nothing to its original meaning. The dream of our fathers was to found a republic—the Constitution and its early amendments delineated such a theory. It may be questioned whether, particularly subsequent to the Civil War, all

amendments to our Federal Constitution have not veered from an early conception of republicanism to an enlarged dream of free and untrammeled democracy. If the remedy for the ills of democracy is more democracy, it should be remembered that the tyranny of mediocrity may sometimes be encountered. It may be observed that the spirit of our common law appeared to clothe reforms already attained in the garments of statutory enactments, while the tendency of a freer democracy seems to attempt to initiate reforms by legislation. It would be singular if the public press or the people undertook to operate the business of the country by heterogeneous assemblies resulting in resolutions or directions, or if the colleges or the hospitals should receive such control respecting the specialties of their vocation, and yet, there is a growing disposition to hold the lawyers and the courts responsible for all the deficiencies of the government and its administration, without leaving to the best and ablest of our legal experts the enactment of our law and the construction and declaration of our jurisprudence. It may be questioned whether the nation is obsessed with partisan politics and whether the statesmanship so essential to successful government is vanishing. The functions of public business are not organized in such a way apparently as to command and hold the ablest and best of our public servants. The niggardliness of compensation for public service is a largely contributing factor in the loss of skilled and efficient public servants. In many cases, when ambitious and aspiring talent or genius in public service appear, organized business, with larger rewards, engages such assistants. It is entirely legitimate both for the person and the business, and yet the public suffers. The amazing turnover among the teachers in our public schools is an alarming commentary upon the stinginess with which we compensate public labor. Teaching for many is experimentation toward some other business or profession. Two or three years make up the span of experience of the average elementary teacher. The same apalling situation appears to exist in almost every line of public service. Compensation is so scant as in many cases to invite crafty or unjust enrichment. Many able lawyers are unable to occupy positions of public trust because of the scantiness of public salaries. This is partly true of the Judiciary. It is not wonderful that our courts in the administration of our laws are sometimes subjected to criticism, but it is marvelous that with so little return either in financial compensation or public esteem, our public offices and particularly, our Judicial positions, have been filled by such able public servants. When spiritual advice is needed, recourse is had to moral experts; when medical treatment is indicated, skillful physicians or surgeons are consulted; when laws are to be enacted or construed, too many times, we do not make it possible to obtain the ability and character of those who are competent for the purpose. It may be inquired whether fees and methods of compensation lacking in stability should ever compensate for public

work. Many thoughtful lawyers contemplate whether the elective Judiciary will continue to obtain the ablest and best of our lawyers as judges and whether it will subject our courts to increasing lack of public respect. It may be suggested that popular respect for courts appears largely to depend upon the personality of the judge, and his ability to fill without question the high position. It may well be wondered whether subjecting our judges to embittered campaigns for popular suffrage and election befits the dignity of high office or comports usually with that judicial temperament so necessary to a proper administration of our law. Expensive campaigns, attended by circumstances frequently lacking in the elevation of the bench, together with uncertainty of tenure for fear of lack of popular favor, may cause us to wonder whether our compensation and our method of selection will continue to insure the luminous place of Mississippi in the jurisprudence of the nation. It has been our proud boast that Mississippi, with one other Southern State, equalled a few other illustrious States in the towering excellence of its Judiciary and particularly in the classic quality and elegance of the opinions of its highest court. In some states, Bar Associations have already actively co-operated in the selection of judges and in some jurisdictions, Bar Associations select candidates to go upon the ticket. It must be remembered that these suggestions have no relevance to our courts in general, but they are directed rather at a condition and a system which must cause thoughtful lawyers to realize that all judges are human beings and that so much of free and untrammeled democracy with so little public esteem and regard, and such scant compensation, will result in the disintegration of the administration of law and justice and in an effeminate lack of stamina, all of which will destroy the righteous force of law and the fearless administration of justice. Probably more public criticism is directed at alleged delays of justice than any other phase of legal procedure. Much delay is inevitable and much criticism proceeds from ignorance of due process of law; nevertheless, it must be admitted that justice too long delayed is justice denied and that, no doubt, part of the apparently general present impecuniosity of lawyers is due to their own delays. Many judges, sometimes with a misguided ideal of courtesy, hesitate to progress or dismiss pending causes, no matter how long they have appeared upon the dockets. In too many instances, professional courtesy, in itself a virtue of the highest rank, it prostituted toward the desire of some client who would utilize the character and standing of his lawyer, in amending the weakness of his cause. It is seriously stated by many statistical students that the lack of efficiency among many of the lawyers and the dilatory process and delays of administration, have resulted in denying the lawyers many fields of lucrative business. It is to be observed that corporations, particularly, trust companies, have embarked upon many phases of law. There are many large business organizations which eschew court pro-

cedure when possible, and do not hesitate to say that the expense and delays of the lawyers make it more profitable to settle or arbitrate. It is not uncommon for clients to consult their counsellors and then conclude that they will pursue their own efforts rather than chance the hazards and run the gauntlet of the delays of the law. It may be respectfully inquired whether the lawyers themselves are not largely chargeable with such a situation, if it exists, as it is widely said to do.

Since the World War, Science, pure and applied, and Business, excluding only the Law and Agriculture, have marvellously progressed in efficiency and in standardization. It may be urged that mass production and standardization do not accord with the individualistic spirit of our nation; however, the lessening fields of legal business for lawyers and the diminishing results, concern not theories, but facts. Business prior to the World War, appeared to find it necessary to separate for competition rather than to co-operate for organized mass production in order to satisfy the spirit of the times. Trusts were regarded as inimical to public welfare and the gravitation of dissociated units into centers of finance and trade were severely penalized under anti-trust statutes. Centralization and concentration appear now to meet public approval. Competition dissolves when co-operation begins. The individual peddlers of other days gave way to independent stores which began to thrive shortly after the Civil War. It may be questioned whether the independent stores or the chain stores will survive. The lawyers may contemplate whether there is not a centralization process at work. A great deal of a lawyer's professional duty cannot be delegated or intrusted to others. Much modern efficiency of method and of production might profitably be surveyed by the lawyers. Certainly the Law is a profession and not a trade. The satisfaction of duty well done and of service excellently performed rather than the comfort of profit taken whether earned or not, should continue to be the goal of the lawyer, and yet, in this pragmatic age, we should solemnly and earnestly contemplate what the lawyers as an organized unit may do in order to insure themselves at least a living competence and perform the highest obligations of their profession in respect to the perfection of legal administration and procedure.

It is said that the population of our country increased ten per cent within the past six years, but that the number of applicants for admission to the Bar increased eighty per cent. We do not need more lawyers, but better lawyers.

Our illustrious predecessors, who wrote our American Constitution and declared its meaning, were experts in statecraft and in legal lore. They knew the history of the free democracies of the ancients—they knew where Scylla and Charybdis lay in the uncharted seas of democracy. They stabilized the keel of our Ship of State, and like vestal virgins, kept burning the altar fires of American liberty. They established our government and pre-

served its life; to us, as to crusaders in search of a holy grail, they have intrusted the light of ordered liberty and the luminous vision of America's destiny. Shall we not heed our country's summons to leadership, which is the high calling of our noble profession? Shall we not consciously and courageously recognize the seriousness of our own obligations toward the law and its administration, remembering that our sense of justice should always be keen and our search for truth unafraid? Shall we not remember that there is peace of war and a calm of discord, and that there is a national decline which is the tranquility of decay and the penalty of violated law? Unguided idealism and abused power produce disordered liberty. Shall we not, too, remember that there is a peace of law? Let us "make the world safe for democracy," but, let us, too, make democracy safe for the world, "to the end that government of the people, by the people and for the people, shall not perish from the earth."

SUGGESTED DISTRICT ARRANGEMENTS OF MISSISSIPPI STATE BAR ASSOCIATION

Arrangement No. 1

Fifteen Districts

District 1: Hancock, Harrison, Jackson, Pearl River, Stone and George counties.

District 2: Jefferson Davis, Marion, Lamar, Forrest, Perry and Greene counties.

District 3: Covington, Jones, Wayne, Smith, Jasper and Clarke counties.

District 4: Scott, Newton, Lauderdale, Leake, Neshoba and Kemper counties.

District 5: Winston, Noxubee, Oktibbeha, Lowndes, Clay and Monroe counties.

District 6: Alcorn, Tishomingo, Prentiss, Tippah and Ittawamba counties.

District 7: Calhoun, Chickasaw, Pontotoc, Union and Lee counties.

District 8: De Soto, Tate, Lafayette, Marshall and Benton counties.

District 9: Tunica, Coahoma, Quitman, Panola and Tallahatchie counties.

District 10: Yalobusha, Grenada, Carroll, Montgomery, Webster and Choctaw counties.

District 11: Bolivar, Sunflower, Washington, Sharkey and Issaquena counties.

District 12: Leflore, Humphreys, Yazoo, Attala and Holmes counties.

District 13: Warren, Hinds, Rankin and Madison counties.

District 14: Pike, Walthall, Lincoln, Lawrence, Copiah and Simpson counties.

District 15: Claiborne, Jefferson, Adams, Franklin, Wilkinson and Amite counties.

Arrangement No. 2

Sixteen Districts

District 1: Stone, George, Jackson, Harrison and Hancock counties.

District 2: Pearl River, Lamar, Forrest, Perry and Greene counties.

District 3: Smith, Jasper, Clarke, Covington, Jones and Wayne counties.

District 4: Winston, Noxubee, Neshoba, Kemper, Newton and Lauderdale counties.

District 5: Chickasaw, Monroe, Clay, Oktibbeha and Lowndes counties.

District 6: Alcorn, Tishomingo, Prentiss and Ittawamba counties.

District 7: Union, Lee, Pontotoc, Benton, Tippah counties.

District 8: De Soto, Marshall, Tate and Lafayette counties.

District 9: Tunica, Coahoma, Quitman, Panola and Tallahatchie counties.

District 10: Yalobusha, Grenada, Montgomery, Calhoun, Webster and Choctaw counties.

District 11: Bolivar, Sunflower, Washington, Sharkey, Issaquena counties.

District 12: Leflore, Humphreys, Yazoo, Holmes and Carroll counties.

District 13: Attala, Leake, Scott, Madison and Rankin counties.

District 14: Hinds, Warren, Copiah, Claiborne and Simpson counties.

District 15: Jefferson, Adams, Franklin, Wilkinson and Amite counties.

District 16: Lincoln, Lawrence, Pike, Walthall, Jeff Davis and Marion counties.

JUDGE A. A. ARMISTEAD: Mr. President, after having listened to your magnificent address, I move you now that we do adjourn until two o'clock.

(Said motion was duly seconded.)

PRESIDENT CURRIE: There is a motion which has been seconded, but Mr. Maynard wants to make an announcement.

JUDGE ARMISTEAD: I withdraw my motion.

HON. GEO. MAYNARD: I just want to make this announcement. I want to beg of all of you who are attending

this Bar Association, all the lawyers, and even members of the County Bar Association, to register while you are here. You can register at the Alcazar Hotel. Now, that is important, because that is a record that the State Bar Association would like to keep as to how many attend these functions we have annually; and it is important in another respect, if your wife inquires as to where you were on May 1st, you have a complete alibi.

PRESIDENT CURRIE: Mr. Jiggitts desires to make his report at this time.

ANNUAL REPORT OF SECRETARY-TREASURER, 1929 MEETING

To the Mississippi State Bar Association:

Your Secretary-Treasurer begs to submit the following report:

RECEIPTS

Dues collected since last report	$1,395.00
Collected from sale of banquet tickets	334.00
Balance cash on hand from 1928 report	1,616.91
Total	$3,345.91

DISBURSEMENTS

Markham Hotel, for banquet	$ 345.50
Markham Hotel, for tips	8.00
Expenses of C. B. Ames (address, 1928 meeting)	65.72
Hotel bill of C. B. Ames	4.50
The Dixie Press (for banquet tickets)	15.00
Powell, Harper & Jiggitts (refund on L. D. call)	1.65
R. S. Streit, reporting 1928 meeting	198.07
W. C. Sweat, expenses	33.57
George W. Currie, expenses	10.00
Robert H. Powell, expenses	3.00
T. C. Kimbrough, expenses	12.68
Stamps	10.00
Miss Maie Whitehead, multigraphing letters	4.00
McCowat-Mercer Co. (July issue, Law Journal)	491.85
Powell, Harper & Jiggitts (refund on L. D. call)	2.00
J. L. Albritton, for 1928 Ole Miss Medal	25.00
George W. Currie, long distance telephone calls	3.50
J. R. Long, expenses incurred by special Grievance Committee	10.80
Allendale Greenhouse, wreath for Hardy memorial	25.00
Stamps	10.00
Stamps	10.00
Ross & Yerger, premium on Treasurer's bond	10.00
Hederman Bros., for letter heads	7.00
Miss Maie Whitehead, for multigraphing letters	4.00
Geo. W. Currie, long distance telephone call	1.80
J. L. Barton, stenographer special Grievance Committee	15.40
Tucker Printing House, 1929 membership cards	9.25
Stamps	10.00
Salary of Secretary-Treasurer	300.00
Exchange on checks charged by bank	.97
Balance on hand (as of April 29, 1929)	1,697.65
Total	$3,345.91

I, Louis M. Jiggitts, Secretary-Treasurer, do hereby certify that the above report is true and correct.

Witness my signature this, the 30th day of April, 1929.

LOUIS M. JIGGITTS,
Secretary-Treasurer.

Approved:
GEORGE W. CURRIE, President.

HON. R. H. POWELL: I move the adoption of the report.

(Said motion was duly seconded.)

PRESIDENT CURRIE: Any discussion? All in favor of the motion will say AYE; opposed NO. The motion is carried and the report is adopted.

Are there any visitors with us before we put the motion to adjourn?

HON. J. W. CUTRER: We have the orator of the occasion with us.

PRESIDENT CURRIE: Won't you bring him up and let us introduce him to the members now? (Great applause.)

Gentlemen of the Bar Association, and ladies, I certainly take great pleasure in presenting to you our distinguished guest, the annual orator, Hon. Josiah Marvel, of Wilmington, Delaware. (Great applause.)

HON. JOSIAH MARVEL: I am very much obliged to you for your courtesy and the opportunity to say how-do-you-do to you this morning. As I have heard your Secretary's report, and have heard some echoes of your President's report, and have learned some other things about the efficiency with which you go about your business, it seems to me that I am not needed here at all. I feel out of place in attempting to bring a message to a group that apparently can develop their own message.

I am very much like the situation I was in down in the lower part of my State a short time ago, when an old negro boy that I had known a long time was out on the grass with his pet dog making it do as he chose, stand up, lie down and roll over, and do all of the other things that dogs can be taught to do. Well, I have always been anxious to be able to train dogs, and I said to him, "George, how in the world it is that you can manage to train that dog to do everything you want him to do? I would like to, but I can't." He says, "Marse Joe, the very first thing is you have got to know more than the dog." (Laughter.)

So I feel quite as much embarrassed on this occasion as I did on that; but I know I shall enjoy my visit to your city and to this Association, and I hope the opportunity will be

given me to know each and every one of you before I leave. (Great applause.)

PRESIDENT CURRIE: Your motion is before the house, Mr. Armistead.

All in favor of the motion to adjourn until two o'clock will say AYE; opposed NO. The motion is carried, and we will adjourn until two o'clock.

The Association was called to order at two o'clock p. m., by the President.

PRESIDENT CURRIE: We will have the pleasure this afternoon of having with us first on our program some remarks and discussions in regard to the Mississippi Law Journal. It is a great pleasure to hear from the Editor and the Business Manager, the former a member of the Senior Law Class, and the latter of the Junior Class. Then you will have the pleasure of hearing from the President of the Law School. I am going to present the speakers, and I wanted Judge McGowen, if he came in, here on the platform with us. If he comes in, some lawyer please escort him to the platform. I am not quite sure that all of you can hear, especially in the scattered parts of the hall. Some gentlemen this morning indicated a little difficulty in hearing at times. If you have any difficulty in hearing any of the speakers, or any part of the program in which you are interested, let us know and we will try to relieve you a little on the subject.

I have the pleasure now and the privilege of presenting to you Honorable Dugas Shands, a law student at the University, who has been the faithful editor of our Law Journal in the year that has passed, and I take great pleasure in presenting him now. (Applause.)

HON. DUGAS SHANDS: Mr. President, ladies and gentlemen: I want to express my appreciation for the kind things that Mr. Currie has said about me, and also to express my appreciation for the invitation which has been extended by the Bar Association and the general board which has charge of the student editing work of the Law Journal. We students at the University, particularly those connected with the Journal, appreciate this opportunity to come over here and to present to you the results of the work that we have done on the Journal which you created last year at the Coast meeting. We feel that it is indeed a compliment to us to have the State Bar Association of the State of Mississippi to entrust into our hands the editing and the work which necessarily is connected with this Journal. We feel like that we are due you a very favorable

report. In giving you this report we are submitting to you everything that we have done in connection with the Journal.

The first thing I want to bring to your attention is to compare the Mississippi Law Journal as we have edited it with other journals that come from the institutions over the country. Of course, you want your Journal to make just as good an impression as any of them, and I now am going to submit to you every article, in skeleton form, that we have edited—in other words, just the table of contents. Don't worry. I am not going to try to read them all to you.

The first thing that appeared in the October issue, which was edited by the Law School, was the "History of the Law School," which was compiled largely from a paper which was written in the Law School by the aid of Judge Kimbrough to some students. The next article was the "Rule in Pinnel's Case," written by Judge Hemingway. The next article is, "Is A Negligent Defendant Liable for Unforeseeable Harm Proximately Ensuing?" by Dr. Schermehorn, of Vanderbilt Law School. The next article is entitled "Justices of the Peace—Recent Tendencies," by Dr. A. B. Butts, of A. & M. College. The next article is "The Sign Statute in Mississippi," by Hon. W. A. Schmitt, of Clarksdale. The next article appearing is the question of "Has the Senate of the United States the Constitutional Right to Refuse to Seat a Senator Who Presents Proper Credentials from the State Authorities Showing His Due Election to the United States Senate?" by Hon. Conwell S. Sykes, a student at that time in the Law School. The next paper is "Scire Facias in Mississippi," by a student, W. R. Newman. The next appearing is "Restatement of the Law of Torts with Mississippi Annotations," the annotations being made by Chief Justice Sydney Smith. The next, and one of the things that we feel is the greatest contribution that the Journal has made, is a complete list—that is, as near complete as we could make it, of the lawyers of the State of Mississippi. This completes the October issue. The Journal is issued four times a year.

The next issue that appeared was that of January, containing first, "Some Aspects of Judgment Liens," by W. A. Schmitt, of Clarksdale. The next was "Voir Dire Examination of Jurors," by Roger D. Moore, of the Washington, D. C. bar. The next was "The American Law Institute to Date," by Herbert F. Goodrich, of Michigan. The next was "The Common Law's Debt to Annotations," by George F. Longsdorf, of the Los Angeles bar. The next

is "Fact Research in Law Administration," by Charles E. Clark, of the Yale Law Faculty. The next appearing is the April issue.

The first part of it is devoted to State Bar Association reports, first, "In Memoriam, Judge J. S. Sexton," by R. H. Thompson. Next, "T. C. Catchings," by R. L. McLaurin. Next, "E. B. Harrell," by H. B. Greaves. Then come the reports of committees, Committee on Obituaries and Memorials; report of the Committee on Professional Ethics; report of the Committee on Judicial Procedure and Remedial Reform. Next is a picture of the new Law building which the University expects to have next session. Next is a sketch of the life of Judge Mayes, written by Chancellor Hume. Next is "Supply and Demand in Legal Profession," written by H. C. Horack. Next is "Need of Commission on Judicial Procedure," by T. C. Kimbrough, Dean of the Mississippi Law School. Next is the "Two Donee Statute," by J. W. Dulaney, of Tunica. Next, "Hemingway's Annotated Mississippi Code, 1927, Section 1710," by F. Y. Dabney, of Vicksburg. Next, "Legislation and the Way-Faring Man," by Robert J. Farley, of the University Law Faculty. Next, "Bulk Sales Law," by J. C. Satterfield, student. Next, "Consent Decrees Against Infants." Next, "Legal Ethics," by B. C. Adams, student at the Law School. Next, "Res Gestae In Mississippi," by Jason H. Floyd. Next is "Recent Mississippi Cases," by C. S. Sykes, student at the Law School. And next a complete republication of the members of the State Bar Association, arranged alphabetically.

Ladies and gentlemen, that constitutes the work that has been done by the Law Journal this year. Now, in comparing that with other law journals, we must decide what law journals we are going to compare with. At present, as I understand the situation in the law schools, the University of Michigan, Harvard Law School, and Yale Law School practically set the example of the law schools over the United States, and they control the procedure, the courses, and the rules which we follow. They practically dominate the influence of the American Associated Law Schools. Comparing our Law Journal as was edited the last three months, with the Yale Law Journal, the Michigan Law Review, and the Harvard Law Journal, we find that we are deficient in only three particulars. The first is that they have a section of the journal devoted to book reviews. Within the last three weeks the Mississippi Law Journal has made arrangements with the leading publish-

ers over the nation to have sent to it next year, for review purposes, the leading books by the prominent authors over the country. That will make us complete in that way.

The next particular in which we are deficient is the fact that most of our articles—this is in no way a criticism of the Journal, but merely a comparison with the other journals over the country—are very few in number that come from the leading law professors over the country. This is mainly due to the fact that the Mississippi Law Journal is a very young child, only one year old, and it has not yet become established so as to draw articles from the leading professors over the country. Another reason why we have not these articles is the fact that most of the articles are paid for, the men writing them receiving some compensation. The Journal this year, being "on its own," you might say, set out to do the best it could in a literary way and be a success financially, and we were very guarded in any expenditures that we might make.

Another thing I would like to call to your attention is to consider what is the purpose of a law journal. The first purpose, as I see it, is to create and formulate a friendly relation between the members of the Bar and the law students. This can be accomplished to a very large extent by the Law Journal. In my case, when I meet an older lawyer I always wait for him to suggest some topic of conversation and wonder if there is anything that he can talk about in the law that I will know something about. Now, with the Journal we have more in common, and through the articles that are submitted by the members of the Bar and the articles that are submitted by the students, it brings the members of the Bar and the students into closer contact and solidifies the younger generation with the generation that has already made a success of our profession in the State.

The next purpose, as I see it, in a Law Journal, is that it is a benefit to the law students. How, we ask? First, it gives him the experience and training in work that he is going to need in after life when he has become a member of your Bar; in the topics he has to work up, because if we can prevent it, we do not allow an article to go out that in any way is open to criticism by the members of the Bar. It gives us experience in running down cases and working them up and presenting them in a workmanlike manner.

The next value of it to the law student and to the law school is that it gives an incentive to the members of the faculty to do research work, and in the South we are some-

what behind in that particular in reference to law schools, because of the fact of our limited financial means in the law school. Few of the Southern law schools have such financial backing as they can hire men and allow a particular professor to go into the research work as is necessary and is now being done in the northern schools.

The next benefit and purpose of the Law Journal, as I see it, is that it is a very, very, great help to the members of the Bar. Take, for instance, some article that is discussed either by another member of the Bar or by a student. In that he is attempting to present, through the Journal, every authority in the State on that question. He is attempting to work it out in such a manner as you, much better than we do, present your briefs to the court. He lists as his foot notes or else in the body of his paper the authorities bearing on that question, the key numbers in the digest, or a citation in any textbook that he might find material to the point under discussion and pointed out in it.

Now, that presents three purposes of the Law Journal, and three which I think will show that this Association will be well repaid in having created the Mississippi Law Journal.

The next thing that I want to point out is this, that in the next year the plan of the Journal is now to have a department designated as the "Open Forum." The purpose of this is to arouse interest among the lawyers of the State. It is to be devoted to a constructive criticism of the United States Supreme Court decisions, of the Chancery Court decisions, and of the State Supreme Court decisions. This is to be purely legal and is supposed to have no passion or prejudice behind it at all. It is to be purely for the purpose of allowing a person to present his views, if he thinks that some constitutional guarantee has not been properly guarded by the Court, to have him present, not in rebuttal of the Supreme Court decision, not in special criticism of it, but merely in a short, concise article to present the point that he thinks might have been overlooked by the Supreme Court.

In the name of the Bar Association—and I take some freedom in granting to myself that privilege—and in the name of the Law School of the University of Mississippi, I want to thank here publicly each one for the contribution to the Mississippi Law Journal this year. It is no little job, I know, for a lawyer to drop his work and to devote his time to working out an article and sending it to the Journal,

and I want to thank each one of those men and tell them that the Journal deeply appreciates everything that they have done. Also I want to express the appreciation of the Law Journal in the fine co-operation of the Executive Committee of the State Bar Association and also to express our great appreciation to Judge Kimbrough for the work he has done with us. Had it not been for the information of his knowing exactly what a Law Journal is, we could never have produced the results that we have. I think we have taken up quite a bit of the time of the Executive Committee, and of Judge Kimbrough. I want to thank them and tell them that the Board that is leaving the Journal this year has appreciated their association and the help they have given us much more than we have portrayed to you through the pages of the Journal.

Another point I want to bring out, is that next year the Journal is going to be turned over to the present Business Manager, and who is the most efficient boy that I have ever had the pleasure of working with, and next year the Editor of the Mississippi Law Journal will be Edwin White. I thank you. (Applause.)

PRESIDENT CURRIE: I have the pleasant privilege now of presenting to you the present Business Manager and the newly elected Editor, Edwin White.

MR. H. EDWIN WHITE: Mr. President, ladies and gentlemen, I appreciate so much the kind things that Mr. Shands has had to say with regard to me. I never have had a greater pleasure than in working with him on the Law Journal this year.

Mr. Shands, having reviewed the activities of the Journal from an editorial standpoint, it will now be well for us to turn to the meat and bread side, otherwise, the financial end. As you all know, the Journal was given existence down to your convention in Gulfport last summer, when we had to start from the ground and work up. We had no advertising and we had no subscribers, and so we began to put on a campaign for each. And may right here I thank the vice presidents of the State Bar Association of the various counties for the wonderful work which they did in securing subscriptions. They went out and secured subscriptions from the lawyers of their respective counties. And also it seems to me that some expression of appreciation should be given to the boys of the Law School, all of whom got out and worked to secure subscriptions in order that the Journal might be made whatever success it now is.

Let us now turn to the audit which was prepared by

the Senior Auditing Class of the University of Mississippi. I should now like to read a few items which will probably be of interest. The Journal this year has cleared $430.00, subscriptions have totalled $882.95. and we have sold $560.00 in advertising.

This is the statement which the Senior Auditing Class makes:

"TRIAL BALANCE," MISSISSIPPI LAW JOURNAL

APRIL 29, 1929

Cash on Hand	$ 452.66	
Expenses	687.29	
Subscriptions		$ 882.95
Advertising		560.00
McCowat-Mercer Printing Co.	75.00	
University of Mississippi	60.00	
Lawyers Co-Operative Publishing Co.	60.00	
Hotel Gayoso	6.00	
Bancroft Whitney Co.	45.00	
Colonial Hotel	6.00	
Bobbs-Merrill Co.	35.00	
Neilson's	5.00	
R. W. Reid & Co.	6.00	
Davidson's Variety Store	6.00	
	$1,442.95	$1,442.95

"We, the Senior Auditing Class, having audited the books of the Mississippi Law Journal, as submitted by the Business Manager, find the above statement to be correct.

"Mr. White informs us that there is a liability not shown on the books due to the McCowat-Mercer Printing Company, for the April issue. The amount of the bill will be approximately $325.00, less $75.00 due the Law Journal by them for advertising. The reason for this omission is that the bill has not yet been received."

Respectfully submitted,
FELTON M. JOHNSON,
For Senior Auditing Class, University of Miss.

Attest:
A. B. CROSER,
Com. & Business, University of Mississippi.

Now, to go a little more into detail as to the methods of raising this revenue, probably you will be interested in knowing just from what sources the subscriptions have come. You gentlemen of the State Bar Association have given us 140 subscriptions. Every boy in the University Law School paid $3.00 for his subscription. That gave us a substantial sum. Then as to lawyers of the State who are non-members of the Association, 46 of them have sub-

scribed. Of course, a great means of revenue is through our advertising, but please bear in mind it is the subscription end which brings the big money, and that we will always appreciate your co-operation with regard to it, because that is where we need as much backing as we can possibly get.

Now, in regard to next year's revenue, and hoping to make the Journal the finest success that it possibly can be made, plans have to be made for the financing of it. The Executive Committee of the Bar Association will submit a plan to you which would place the Journal in the hands of each member of the Association, and we are so in hopes that you gentlemen will accept it, in order to make the Journal as fine a publication as it can possibly be made.

Now, there is probably another matter which each of you will be interested in, and that is the benefit which the Journal is doing the Association outside of the State. The Mississippi Law Journal is going to 86 law schools over the United States. We have five subscribers in Germany. One copy of each issue goes to the Philippine Islands. Also there are several Canadian universities who subscribe. Also when each issue of the Journal comes out, one copy of it is put in the permanent files of Harvard's "Index to Legal Periodicals." And further, from an advertising standpoint of the State Bar Association, we are planning next autumn to be at Memphis at the convention of the American Bar Association and to have there on hand a number of copies of the Journal in order that the lawyers who come down to Memphis might see that we are doing something in the way of contributing to legal literature here in this section.

And another matter is that of your interest. Far more important than any financial backing which you might give us is that of your lasting desire to see the Journal achieve success on every hand. We would appreciate so much any suggestions or any criticisms that you may have to make of the Journal. We want this to be your Journal, and want you to feel absolutely free at any time to criticise in any way that you may see fit. And so it is our hope that we boys of the Law School up at the University of Mississippi, along with you gentlemen of the State Bar Association, may join hand in hand in a spirit of co-operation, and through the Journal play a large part in accomplishing that all-desired end, justice for all in the State of Mississippi.

Now, if there are any questions which any one would

like to ask regarding the finances of the Journal for this year, I should be glad to answer them. If there are any questions, please ask them. If not, that is all. I thank you. (Applause.)

PRESIDENT CURRIE: The Secretary will read the resolution which the Executive Committee has recommended to the Bar Association.

SECRETARY JIGGITTS: Gentlemen, I will read the resolution of the majority of the Executive Committee, in session April 30, 1929; "Resolved, that the Executive Committee recommend to this Association that the Secretary-Treasurer be authorized and instructed to contribute to the Mississippi Law Journal the sum of $800.00, said $800.00 to be used for the publication of the said Law Journal during the year 1929-1930, and to be paid upon demand of the Business Manager of said Journal. The proceedings of the present session are to be published in the August, 1929 issue of said Journal without further cost to the Association, and in consideration of said contribution each issue of the Law Journal shall be sent to each paid up member of the Association without cost."

HON. R. H. POWELL: Mr. President, as a member of the Advisory Committee I know that as a fact we now have about $1700.00 in the treasury, and our Secretary-Treasurer advises us that he can pay this $800.00 out for the coming year without crippling the Association. So I move the adoption of the resolution as read.

JUDGE W. H. POWELL: I would ask the Secretary to state how much it has been costing us to print the Journal heretofore.

SECRETARY JIGGITTS: I will answer Judge Powell, by saying last year we paid the McCowat-Mercer Co. $491.00 and some odd cents, I think it was 65 cents, but I am not positive about that. The year before we paid over $500.00. So that we will actually be contributing towards the Journal $300.00 over what we ordinarily pay. For that consideration every member will be getting the Journal for all the issues for the year free, without raising the dues one dollar.

JUDGE W. H. POWELL: I second the motion.

HON. GEORGE BUTLER: How much did we contribute to the Law Journal last year?

SECRETARY JIGGITTS: We did not contribute a nickel. We simply paid for the first issue which contained our proceedings, and that was $491.00 and some odd cents.

PRESIDENT CURRIE: It may be stated in addition

to that, the members who subscribed, of course, paid individually $3.00. That is correct, isn't it?

SECRETARY JIGGITTS: Yes, sir.

PRESIDENT CURRIE: Is there further discussion.

HON. A. W. SHANDS: Mr. President, I think that motion should unquestionably prevail. You have in your address this morning a recommendation that we should do as much as possible toward increasing membership of the Association. I think the fact that this Journal is published and goes into the hands of every member of the Association will do more towards awakening interest in the Association than any other possible thing. There are a great many of us who have attended with a certain degree of regularity for a number of years, and as stated by you in your address this morning, there are a great many others who come when it is entirely convenient. Most of us do not attend. The fact of the existence of the Bar Association is called to our attention only twice a year, once when we get a notice from Louis Jiggitts that our dues have not been paid, and the next is when we begin to make arrangements to see if we can attend the annual meeting. I think if this Journal can be sent regularly to every member of the Association, each man will keep in his mind during the entire year, instead of just on one single solitary occasion, the purposes and the objects as well as the possibilities of the achievements of this State Bar Association. I think it will help the Association more than any other one thing that can possibly be done, and there are a great many of us who are so plagued with applications to subscribe for various and sundry periodicals that we will not subscribe to it. We will never become acquainted with what work is being done by the profession until it is given to us, like salvation, free of charge. We are not going out, we are not going to pay for it, that is, the bulk of us, but if it comes in we will read it, and the reading of it will keep us in contact with the better thought of the profession, not only in this State, but throughout the nation, from articles that are contributed through this Journal from men of brains and intelligence from other sections. Some of the articles in here, especially the article by Professor Clark of Yale University, who is one of the learned educators of the United States, I think is most splendid, and will give us a vision that we will not otherwise obtain in wrestling around with each other in our home counties, in justice of the peace courts, and things of that kind. So I earnestly urge the

adoption of the resolution as read by Mr. Jiggitts. I thank you. (Applause.)

HON. R. H. POWELL: I would like to state, to give the Association a little further information, that $800.00 will not publish the Journal, but Judge Kimbrough, Dean of the Law School, says that they raise five or six hundred dollars by advertising which will publish the Journal.

JUDGE T. C. KIMBROUGH: I would like to say to the Association here that the boys in the Law School are going to do their part towards getting the Journal out. Each one of them in the Law School will subscribe to it, thereby creating a fund of something like $250.00 or $300.00. They are glad to do that, contribute that much towards bringing the Journal out.

PRESIDENT CURRIE: Any further discussion?

HON. H. A. SHOTTS: How many copies do we have to have published for them?

MR. H. EDWIN WHITE: The number of copies that will be published will be 900. Of that number, the law students will get 85; law schools over the United States, 86; outsiders, 36; subscribers who are non-members of the Association, 46; members of the State Bar Association, 570.

HON. H. A. SHOTTS: Isn't it a fact that the publishers charge so much a page for that?

MR. H. EDWIN WHITE: So much a page, yes, sir.

HON. H. A. SHOTTS: What is the average cost—$2.00 a page?

MR. H. EDWIN WHITE: No, sir, the average cost this year on a 500-copy basis has been $2.30, but on the 900-copy basis it will be $3.00 per page. I have here an estimate prepared of the total cost for next year; it would be $1600.00.

HON. H. A. SHOTTS: With that information, Mr. President, I favor the adoption of the resolution.

PRESIDENT CURRIE: Any further discussion? Those favoring the motion will say AYE; opposed, NO. The motion is carried.

I now have the pleasure of presenting to the Association Honorable Charles Scott Sykes, President of the Law School at the University of Mississippi.

HON. CHARLES SCOTT SYKES: Mr. President, ladies and gentlemen, I appreciate the kind words of introduction said by your President. When I first received the invitation from your President to address you on a subject concerning the Law School, I immediately wrote my accept-

ance, little contemplating what I was letting myself in for. It was with some difficulty that I chose the subject which I believe you will be more interested in concerning the law work than anything else, and that subject is, the practical law that is taught at the University Law School.

Let us dwell here just a moment on the two ways of teaching law. Probably most of you were taught law under the old text book system, which is used very little nowadays in the law schools, having been supplanted by the newer method, the case book system. Under the old text book system the bare principles and rules of law were outlined and laid down in dry statements. The originator of the new system or case book method, Mr. Lango, I believe his name was, has stated that there are very few fundamental principles of law that a student should learn while in the law school, and that consequently having these few fundamental principles to learn, they can be more vividly appreciated and brought out by having a concrete example of their application to a statement of facts set out before him. Therefore, the case book method has been substituted wherever practicable for the old text book method.

This case book method gives the student just a little idea of the practical pleadings that go on in certain cases. Of course, it is not only by reading cases that the student can understand and appreciate what pleadings consist of and what pleadings are, when they should be applied, and what they should contain merely, but on the other hand it gives him just a brief insight into the procedure in handling a case before a court.

I have prepared here a list of the studies taught in the Law School which you might be interested in, and in reading these to you I will only dwell on those which embody the practical law that is taught. The first is Contracts, Torts, Personal Property, Agency, Criminal Law and Procedure, and Sales. The course of Law Bibliography, you may not have heard of, because it is of comparatively new introduction into the law schools. The course deals with brief writing and the use of law books. The student is made to prepare both trial and appeal briefs, containing such matters as you yourselves place in your briefs. Of course, the briefs, I imagine, are not like yours. But the other side of this course covers the use of law books, teaches the student where and how to find the law. Of course, it would be absolutely useless to send a young lawyer out from the University not having any idea as to where to look for

the law. This course teaches the student the use of all the encyclopaedias, that is, the encyclopedias more in common use than the others. Those are Ruling Case Law, Corpus Juris, Cyc, American Digest System, and the like. And the student is given abstract statements of facts to look up and to hand in, and then reports as to what the law is on that subject, citing his cases under that. In this way he gets to be familiar with these encyclopedias and knows where to find the law.

The course of Criminal Law and Procedure is a very important course for the first year student, in that he is made to prepare affidavits for warrants of arrest and the like, thus giving him information as to these subjects which he would otherwise in after life probably have to learn by hard experience. The student can not get an idea of those things until he has been shown how to do it, and the Law School is teaching him that.

During the second year the following courses are offered, Equity, Evidence, Common Law Pleading, Insurance, Code Pleading, Real Property, and Corporations. Under the subject of Common Law Pleading, which is taught the first semester, while the Common Law Pleading is not applicable to the present day pleadings in our state, still the student is given an insight into the English System of pleading so that he may more readily understand and comprehend the old English cases which are frequently found in this case book system. It is during the second semester in the course on Code Pleading that the student gets his first teaching as to the actual pleadings in our state. This course deals, on the one hand, with the pleadings of our state, and what they should consist of, of course, in the circuit court, and the statutes of our state concerning the circuit court, and cases under that are given for the benefit of the student. Besides that, on the other hand, on the practical side of the case, each student in the class is made to prepare pleadings from declaration down to surrebutter and made to hand them in, just as he would hand them in in Circuit Court in a case of actual litigation. Thus a student by this course is informed as to what these pleadings look like and the matters generally they should consist of, when they should be filed, and, of course, a great deal of attention is paid to the summons. This is very important, I think, because of the fact that many cases have gone off because of a bad summons, and the student is now taught in the law school how to draw up his sum-

mons, how to make returns on it, when it should be sent out, returned, and so forth.

The third year the following courses are offered, Constitutional Law, Bankruptcy, Federal Procedure, Chancery Practice, Administrative Law, Municipal Corporations. While the course in federal procedure is similar to the state procedure as a matter of practical use, nevertheless it goes to a large extent more into details than anything else on what is the jurisdiction and venue of the federal courts. It is under the course on chancery practice, however, that the student gets his actual knowledge as to the practice in our chancery court. Griffith's Chancery Practice is the book that is studied, and after the student has gone through this book he is made to draw up the various pleadings, bills of complaint, answers, and so forth, and especial attention is also in that course paid to the summons. These courses ground the student into the pleadings of our courts. It teaches the student what the pleadings should consist of, and makes him familiar with them to a certain degree. Of course, there are very many practical things that can not be taught in a law school, and the student necessarily upon graduation must learn these things through experience or through association with the members of the Bar.

To further aid the student in appreciating and understanding actual practice during the senior year, the practice of court cases, moot court cases, is given by the members of the senior class. The members of the senior class are divided into firms consisting of two each, and each of these firms has two cases a semester. The first semester consists of work in the Circuit Court, and each firm is made to represent a plaintiff and a defendant; and the same takes place in the chancery court work during the second semester.

These are the practical things that are now taught to the students of the University Law School, and the law professors believe by instructing the students along those lines they will send out to you young lawyers who are better adapted towards a realization of what law is than they would otherwise be if such training was not given to them.

There is an old proverb which says that any old place in a speech is a good place to stop. If, as far as you have gone, you have made a good speech, it is a good place to stop, and, if as far as you have gone, you have made a poor speech, it is a mighty good place to stop. We students of

the Law School appreciate your invitation and cordial reception here very much, and we are delighted at having had this opportunity of being with you. I thank you. (Applause.)

PRESIDENT CURRIE: I am sure I express the sentiment of the entire Bar Association in not only welcoming these young gentlemen here, but in saying to them how delightfully entertained we have been by their addresses.

We have on our program what is denominated a Round Table Discussion, something possibly of a venture. I do not know what you lawyers will make out of it or what you think about it, but we have invited some lawyers to discuss a few practical subjects here, and it is not the purpose of the Executive Committee or myself to shut off anybody except as time may limit you, so if you have any practical matters that you want to get off, this is the time in the program for it. I have been trying to get Judge McGowen onto the platform so we lawyers up here can say what we think about the Court. I wonder if he won't come around with us. Judge McGowen, as you know, is one of the genial judges of our Supreme Court. We had expected to hear from Honorable J. A. Cunningham but I have a telegram saying that illness prevents his coming, so Honorable T. J. Wills has consented to take his place, and I present to you at this time Honorable T. J. Wills, of Hattiesburg.

HONORABLE T. J. WILLS: Mr. President, ladies and brethren of the Mississippi Bar: I came to Clarksdale to enjoy myself, and about thirty minutes or an hour ago the President of this Association said that he was pressing me into service, and then I wished I had not come. I am what you call a substitute. You know what a substitute was during the Civil War. When a man of means was drafted to go to war, some poor fellow in the community that did not amount to anything and it did not matter if he was shot, was hired as a substitute and sent in his place. That is what I am here today, a substitute, and I hope in your Round Table discussion of this question of fees that you will not shoot me or hold me responsible for what I say, because I'm like the old negro preacher that got up to preach. He said there weren't but two people that knew what he was going to say, and they were himself and the Lord, and he doubted very much whether the Lord knew or not. So that is the way it is with me. The fact of the business is I have never collected enough fees in all of my practice to be any expert on the questions. (Laughter and applause.)

The profession of the law in the United States, and, coming nearer home in Mississippi, is the heir ascendant of the profession as it was practiced centuries ago in England. It was considered a very honorable profession, but one in which a man was not permitted to engage unless he had sufficient income independently of his profession to keep him in comfortable circumstances if he did not earn a dollar or collect a dollar from his fees. He was, therefore, not permitted to advertise his profession or to solicit business, and those same ethics of our profession have continued on down to the present time, and because we consider our profession a very honorable profession, we are not permitted to solicit business or to advertise the wonderful powers that we have of persuading the Supreme Court to see the justice of our client's case. As a result we sit in the office and read in the musty pages of Blackstone or Shepard and the other old commentaries, and the more recent expressions of our own and the neighboring states' Supreme Court of what the law is today as compared with what it was on yesterday. (Laughter.)

HON. W. E. GORE: Can you tell anything about it after you read it?

HON. T. J. WILLS: Oh, no. The Court does not expect you to. (Laughter.)

When the client comes in we size him up, based purely on his looks and the way he talks, as to his possessions of this world's goods, and his ability to earn, and then with a great deal of trembling and trepidation we announce to him just how much we will charge him to safely navigate his little boat through the sea of litigation to a safe harbor where he can anchor and go on his way rejoicing.

You know there is no concerted understanding or concerted thought among the members of the Bar of the different counties of the state as to what a reasonable fee for certain services rendered would be. I think I can go further than that and say with safety and without fear of contradiction that there is but very little harmony and unity of thought among the members of any bar as to the amount of fees that ought to be charged and collected for any given services rendered to a client. You know I have thought that it would not be amiss if we had a department in our Law School at the University, there to teach the young men who are followers of Blackstone and preparing themselves to embark upon the sea of legal strife what elements they should take into consideration as to forming the value of

the services that they are to render to a client and upon which they could base their fee.

I want to give you a little illustration that happened, and before I do that, will you pardon me if I say that those of you who are practicing law in this great Mississippi Delta, the empire of the State of Mississippi, can have no idea or conception of just what we fellows that practice in what are known as the cow counties have to think about and deal with when it comes to charging and collecting fees sufficient to keep soul and body together. You know ever since I was first admitted to the bar, the enticing reports that I had of the juicy fees collected by the lawyers in the Mississippi Delta, had its siren call for me to move from the cow counties into the Delta, and I was only prevented from doing so by the fact that I was never able to pay automobile hire to get from the hill counties over into the Delta.

I want to tell you about a little incident down in the county that I came from. A man was charged with murder. He had been admitted to bail and was seeking to employ counsel. These cow county lawyers were bidding and they bid down to $5.00, and after a while one of them said, "My daughter has got to have a pair of shoes. I will take the case for $2.50." That was an actual occurrence. That happened, and it illustrates to my mind the fact that lawyers have never taken into consideration the elements that go to make up the value of their services that are rendered.

You take the mercantile business, the manufacturer—may I be permitted to illustrate by taking the manufacturer of yellow pine into lumber, because I am from the yellow pine section of the State of Mississippi. When they fix a price on lumber they take into consideration the cost of the trees as they stand on the land, the carrying charges, that is represented by the interest on the money. They usually borrow the money to buy it with. If they do not, they use their own money and figure they are entitled to a reasonable return upon the investment in the standing pine. Then they figure the cost of logging and cutting it into lumber, they figure the cost of insurance, sales cost, and all of those elements go into fixing the price for their product, and then they add a reasonable profit. Now, after having paid themselves a magnificent salary, they fix the price at which they sell the lumber, and as a result the men that have been engaged in the manufacture of

lumber—which may be extended to the mercantile business and to other businesses in which men are engaged—are prosperous and they can open their stores or their offices at nine o'clock in the morning and close them at five o'clock, and take two months vacation during the year and a trip to Europe, and come back and strut around, while the members of the Bar who are engaged in this most honorable profession strive from early morning to late at night, and the most of them go back to their offices on Sunday, in the place of staying home with their wives and children, and there work in order that they may dispose of a sufficient amount of business, the compensation for which, measured by our standard, would be enough to keep their families from want. What we need, brethren of the Bar, is a higher appreciation instilled into the minds of the people, of the laity, of the value of the services that are rendered by lawyers. (Applause.)

In the first place, you have to be highly educated, more highly educated than the average man or average business man of your state before you are competent to enter the court room and contend with the adversary on the other side who is a trained lawyer, before a judge who has been promoted because of his knowledge of the law and of his ability to understand it. The cost of an education is the primary cost that must be considered by a lawyer when he begins to think of the elements that enter into and to be considered when he makes his fee. And then a lawyer can not practice unless he has bought a library. I do not know why it is, but you have got to buy all of the books that West Publishing Company publishes. (Laughter.) They say, "Buy Leading Cases." I tried that once, and my opponent would always beat me with a case that was not reported in "Leading Cases," and I found out I had to have them all, and when you do that you have up above $10,000 invested, as much as the little banks in the country towns, and the best lawyers and you lawyers in the Delta, when you come to figure up your office equipment find it runs about as much as your bank in the town. That is what you have invested. And then, being a trained man, you are entitled to as much compensation for your services annually, not from each case that you get, but annually, as a man of equal education and training in your community engaged in the most lucrative business. You are entitled to a return upon the money expended in getting your educa-

tion, a reasonable return, and, you know, you ought to have a certain percentage for depreciation. (Laughter.)

You need not think because I look so young and handsome that I am still a young man. I am beginning now to realize for the first time that there is a depreciation upon the investment that was invested in me that was preparing and equipping me for the practice of law. And then there should be a reasonable return with a depreciation, for law books and investment in a library. And there should be at least sufficient compensation to compensate a man for the privations that come to him in being taken away from his wife and children and their association, unless his wife happens to be a "Maggie," in which event there would be but little compensation required.

When you take those things into consideration you figure a lawyer who is making less than ten or fifteen thousand dollars a year is being underpaid. But how many lawyers in the State of Mississippi are making that money? You lawyers in the Delta may be making many times that amount, but you can divide that by four and then be above the average of the lawyers in the hill or cow counties of the State of Mississippi, and you can multiply that sum by two or three and then not be above the income of the man engaged in business who has had the education and training and has the ability of the average Mississippi lawyer.

Now, why is it that we do not recognize the fact that we are being underpaid? Why is it that we do not recognize the fact that we have certain rights that we are refusing and failing to assert? You know what the result of it all is. Suppose the merchants in Clarksdale, in Vicksburg, in Cleveland, in Jackson, Memphis, Meridian and the other towns and cities of Mississippi and the adjoining states would go to cutting prices and sales values, selling under cost, like lawyers are doing when they sell their services, their only stock in trade, their stores and places of business would be closed up and there would be tacked up a little card that would say, "In Bankruptcy."

Now, the lawyers are in bankruptcy, all of them are bankrupt. Of course, a few of you Delta lawyers are an exception to my statement, but I am referring to the average lawyer in Mississippi. We are in bankruptcy. We borrowed every dollar that we could borrow from the bank; we are carrying just as much of an account at the grocery store as the groceryman will give us credit for; we are borrowing money from our friends. Most of us that came here

to the Bar Association borrowed from some friend sufficient funds to get us to the Bar Association; they evidently thought it would help us a little to come up and mingle with the lawyers of the State. We are in bankruptcy, but we do not know it. We have no assets that our creditors could take, and they very kindly permit us to go along hoping that after a while we may be lucky and collect a fee and make a distribution to our creditors without the fees of a trustee.

Now, our own national government discredited and discounted the lawyers and their value when they took over the railroads in 1917—beginning in 1918, and operated them under federal control. They almost doubled the wages of the employees of the railroad, including the section laborers, section foremen, engineers and firemen, conductors and trainmen; they increased their salaries greatly, but as I recall—I was on the pay roll of the little Gulf & Ship Island Railroad—they reduced the compensation, small as it was, 20 per cent to the lawyers representing railroads.

Now, you and I represent the honorable profession of the law. You take the lawyers out of America today and it could not run as a stable government twelve months. They are the backbone and sinews of this great government of ours, and yet we sit idly by and permit the government to discount and discredit our profession. It is not right. I should not stand for it, neither should you, because the law profession has in it the very brains of this great government. How is it that the blacksmith's arm is stronger than mine or yours? It is because of constant use of the great muscles of his arm in swinging the hammer in his trade. What does the merchant do, or the doctor, or the business man, engaged in their profession? He goes along smoothly and smiles and asks you to trade with him, and the doctor looks you over and tells you if you don't do so-and-so, you will soon be on the other side, and then sends in his bill. But the lawyer, when he takes a case and begins the practice of his profession on the other side of the table, before a judge, it is like steel meeting steel, they fight the battle out of right and justice, and there is no human frame or nerves that can stand the conflict, but what decay will come sooner than any other profession in the world; and yet with all of that conflict and that bearing down and fighting each other in the court room, and sitting in the office until the late hours of night and digging to find out what the court has said and what it may

say the law will be, they are the poorest paid profession in all of this great government of ours. It is time that you and I should awake to our rights, and that we should stand up and demand that we be paid a fair compensation and a reasonable compensation for the services that we perform. I do not know of but one lawyer in Mississippi that is being paid as much as he ought to get, and that is the Attorney General, and they are raising a great racket down there at Jackson, Mississippi, now, about his receipts for his services. (Laughter and applause.)

Is it fair? I appeal to you, my brethren of the Mississippi Bar, is it fair for you and me to sit down and supinely permit our very life's blood to ebb out in a work of this character in conflict, and then die and leave our wives to go to the Old Ladies' Home and our children to work on the section because we have not made enough to educate them? It is time that we rise up in our might and that we should adopt some scheme, some plan, by which the Bar of the State of Mississippi have an understanding as to the basis upon which the value of their services is to be computed, and that they compute the value of their services just as a merchant would compute the cost of his goods, including the freight, the overhead, taxes and clerk hire, and then add a reasonable profit to it.

As I said to you in the outset, I am a substitute. I had no time to give this any thought. I am afraid to venture a suggestion on how it should be done because I have not thought it out to any logical conclusion, but the one thing that I do know, that although I have been charging fees that pay me a salary enough to get me by from month to month—I know nothing about large fees—but I know that there should be an understanding, and that the fees paid to the Mississippi lawyers ought to be augmented and increased by 100 per cent. I thank you. (Great applause.)

JUDGE W. H. POWELL: I suggest that you bring on some more substitutes.

PRESIDENT CURRIE: We have another substitute, Honorable R. H. Powell, of Canton. I present Mr. Powell to discuss the subject of group meetings.

HONORABLE R. H. POWELL: Mr. President, ladies and gentlemen: When my father called for more substitutes, he did not know that his son would be on the program, and his son did not know either until a few minutes ago, but inasmuch as I have been listening to my father for many

years, he now will have to listen to his son for a few minutes.

The President, when he requested me to lead the discussion on District Meetings or Group Meetings, told me, he says, "You will not have to talk much. It is a Round Table Discussion. All you have to do is open the meeting and throw it open to the convention, and inasmuch as they are lawyers who all love to talk and talk well, then let them do the talking." So, my friends, while I am making these few remarks, I want you from the different districts to consider in your minds why it is beneficial to have district meetings, to have group meetings, because, as the President suggested, I want you to do the talking for the next ten minutes.

Of course, to ask the question suggests to your mind many reasons why we should have district meetings. And pardon me, when I make a reference here while I am on the stand today, when I declined at first, the President said, "Judge McGowen is going to be up there, too." And then when I saw it would be my only opportunity to sit on the bench with the Judge, I accepted.

My friends, we know that lawyers are leaders of thought and leaders of action most of the time; but I regret to say that in this procedure of district or group meetings we will have to be followers. Of course, lawyers, I say are leaders in practically every line. You men, I take it for granted, are all members of a church, and you know that all the churches have their group meetings, they have their state meetings. For instance, I am a Presbyterian, and I know a little more about that; we have presbytery meetings and we have synod meetings. And the Methodists have presiding elders and the General Assembly, or whatever it is. If the churches have had their group meetings for years; if the Girl Scouts have had their meetings; if the Boy Scouts have had their meetings; if the Girl Reserves have had their meetings; if the Hi-Y Girls have had their meetings; if the Y. M. C. A. have had their meetings for years, isn't that enough to show that the State Bar Association should have group meetings? And what do you mean by Group Meetings? Necessarily it means meetings of the various county bar associations of the various counties. Of course, where there are not many members in a certain bar, there will have to be more counties put together to make these group meetings. Of course, where you have large

bars like Hinds, Warren and Washington, there will be a fewer number of counties.

Now, just one or two thoughts why they should be beneficial, and then I am going to ask you men to rise in a few minutes and give your ideas why we should have these meetings. We know from the association here year by year with the State Bar Association that we form friendships which are everlasting. Many come here to hear learned speakers; others come for the social side. My friends, I dare say there are many counties in the state where there has not been a bar association for the last ten or fifteen years. I regret to say in my county of Madison we have not had a bar association meeting for ten or twelve years, not even when some member passes away. So if we have these district meetings, then the county in which that meeting is held will be bound to have a county meeting to get together, and I say that will stimulate the county associations of the counties, but not only that when the district meetings are held then the State Bar Association membership can be stimulated. We should have five times as many in attendance at the State Bar Association, because those who have not attended the Association do not realize just what benefits they are missing. You know from experience that when you have a matter of business, that is, a collection or a suit to send to some other county to be attended to, whom do you send it to? To that man whom you have met or that man whom you have confidence in that you have met at these meetings of the Association. So I say if we will have group meetings we will then become more familiar with our brethren in the adjoining counties. I dare say there are men in the various counties here that are not known to the other lawyers. Of course, we can not expect to know all the lawyers in the great city—suburb of Canton, that is, Jackson, Miss., but, my friends, if we have these district meetings where Madison, Warren, Hinds and Yazoo counties can get together, necessarily we will get to know each other better and we can swap ideas, and the older lawyers can tell the younger lawyers why the Supreme Court did not reverse or did not affirm certain cases. I can hear my distinguished father telling the group meetings why Judge Morgan Stevens and the rest of the bench did not reverse *Maris vs Lindsey.* (Laughter.) You younger lawyers will find out about that case later. That is where the Supreme Court made the law provide you have to advertise four weeks instead

of three. So I say the older lawyers can give points of law, can advise, can suggest things to the younger lawyers which will be beneficial to them, and not only that, but they can tell us how we can win cases like they won cases years ago.

I am going to ask Judge A. A. Armistead to give us a few thoughts on why group meetings should be beneficial to lawyers.

JUDGE A. A. ARMISTEAD: Mr. President, I am in the position of my friend Wills. I am rather in a state of depreciation. (Laughter.) Since I heard that distinguished lawyer speak, I want to say that I knew him so well; he was born and raised in Smith county, I think I won't be sure, he was practicing law down in Raleigh, the county seat, and the next thing I knew of him he was living in Hattiesburg, a most magnificent city, the lumber city of South Mississippi, and I am sure he enjoys every convenience. And then to come up here and talk like he is starving to death. I want to say to my good friend Wills, if he gets so poor that he can not make a living on the railroad, whom he has been representing so long that he has got our Supreme Court to practically nullify the prima facie statute (laughter), I want him just to come over on a little piece of land where I am going to sit down under the sycamores and hear the birds sing, and I will take care of the whole bunch. I do not want to detain you, but I just want to tell you that I think maybe his fee is too large. (Laughter and applause.)

HON. R. H. POWELL: We take it from Judge Armistead's remarks that he is in favor of group meetings. (Laughter.)

Mr. Welch, are you in favor of group meetings? If so, we would like one or two ideas why they are beneficial.

HON. W. S. WELCH: It takes a very smart man to argue with a man as smart as you are, and if he is a very smart man he won't do it. It takes a rather smart man to make a speech without any notice, and I won't make any.

HON. R. H. POWELL: We have a member who has just come in, from another section of the State. I will ask Honorable Jim McClure what he thinks about district meetings or group meetings.

HON. JAMES McCLURE: Mr. President, I think all I can say on the subject has already been said by the

speaker first called on to discuss it. I am heartily in favor of it and agree with everything that he said.

HON. R. H. POWELL: Judge Leftwich, will you say a few words on why it is beneficial to have group meetings?

JUDGE GEORGE J. LEFTWICH: I think the most practical thing, Mr. Chairman, is the local bar association meetings or county meetings at which the lawyers get together. We are derelict in the local bar association meetings; we have not a sufficient number of members attending. To that extent I certainly endorse all that has been said.

HON. R. H. POWELL: Some of you members who have any good reasons why group meetings are beneficial, would you mind rising and giving them in brief? Any one else? Judge Deavours, we would like to hear you say just a word or two why group meetings are beneficial.

JUDGE STONE DEAVOURS: Mr. Chairman, I do not know anything about this group meeting business, but I want to tell you that I want to say something about this man Wills. (Laughter.) While there are two sides to this question Mr. Wills discussed, I know from very bitter experience that one of my clients—it has not been very long ago, as Mr. Wills knows—laid fifty thousand shining silver dollars in the lap of T. J. Wills, and here he is wanting more. (Laughter.) We ought to get Wills to stop this thing. I have had enough of that. (Laughter and applause.)

HON. R. H. POWELL: If there are no further remarks, I desire to move that the incoming Executive Committee of the State Bar Association will at an early date put into operation these district meetings. I make that as a motion, Mr. President.

(The motion was duly seconded and unanimously adopted.)

PRESIDENT CURRIE: I now have the pleasure of presenting to you Honorable T. C. Hannah, who will make some general observations.

HON. T. C. HANNAH: Mr. President, ladies and fellow members of the Bar Association, I will be very glad to yield my place to another substitute. When the President, as you heard from his announcement, gave me this very broad subject of a general discussion, I concluded that I had better put some limitations on it and I had better reduce to writing what I wanted to say here. I am

very glad that I did so, and I want to read it to you in self-defense, because after having heard Jeff Wills and Bob Powell you would think I was just saying over the speech that they had already made. I want to read you this to show you that I thought of it first.

"A Little More Business in Practicing the Profession of Law."

When our President advised me that I was to participate in a "Round Table" discussion on this occasion, he also advised me that the subject of my discussion would be of my own choice. Having in mind that the most that can be accomplished on such an occasion as this is the planting of some thought worthy of further cultivation by the members when they return home, I decided to present, very briefly, two or three questions that I believe our local Bar Associations can consider and act upon with profit to the members of our profession. Inasmuch as this brief discourse has to be named, I know of no better title than the one announced, "A Little More Business in Practicing the Profession of Law."

It is not my purpose to undertake to discuss the practice of law as a business; for, in the first place, we most assuredly recognize the practice of law as a profession and not a business; and, again I, would not be so presumptuous as to undertake such a discussion. However, we must realize that there has been such a coalescing of business and the professions until we cannot afford to consider the practice of law as a profession and disregard, wholly, the business aspect.

Professor Binder of New York University, in his book entitled "Business and the Professions," very interestingly points out that in the beginning of things business and the professions were as far removed from one another in their concepts as the East from the West. That the professions had as their objective the amount of service that could be rendered with no thought of personal gain; while business had as its objectives the amount of personal gain that could be had with no thought of the service that could be rendered. But he points out how the demands of rapidly developing civilization have worked almost a perfect coalition of business and the professions to the extent that business has become highly professionalized, while the professions have become highly businessized (if I may be permitted to use the term). Every experienced practitioner of today at once recognizes the correctness of these views, for he appreciates that the client is no longer interested merely in "what the law is," but the client wants to know how the law works into or affects his business. The result that flows from the application of the principle of law to the particular business condition is usually more accurately determinable by the lawyer than by the business man.

And now that there has been such a perfect coalition of business and the professions, the responsibility rests upon the members of this noble profession to see that the onward march of business is not retarded by the "law's delays." Criticism and ridicule of the "law's delays" has been part of the principal "past time" of newspapers and magazines for years. If the accusation is just, WE should remove the cause; if it is unjust, WE should defend our profession and refute the accusation. Personally, I am of the opinion that the accusation is not altogether just, for while I concede that there is much lost motion in the administration of law, still I believe there has been practically as much speeding up in the administration of the law as there has been in business.

But, even if this be true, still we must admit that there are many things that our profession, and we as individual members, can do to bring the practice and administration of law in perfect step with modern business.

Too frequently, we have been guilty of dilatory tactics and thereby caused a case to drag much longer than necessary; often times consuming two or three days time in court when the case should have been disposed of in one day. Often this is done because our client desires this course. But when we call on this client to pay for all this time consumed in securing the delay and attending court, he either kicks on the amount of the charges, or, when he considers another piece of litigation, he decides that it will take too long to conclude it or that it will cost too much. Thus, while we may have served this client so as to win his plaudits for this particular case, we may have, at the same time, done an injustice to our profession, ourselves, and the opposing attorney.

Mr. Arnold Bennett has written a very interesting little book on "How to Live on Twenty-Four Hours a Day." He points out that time is the most democratic thing on earth, and yet the most valuable. That we wake up every morning with twenty-four hours of the most precious thing in the world in front of us. It is a question of, what will we do with it? Time is a most important factor in every charge we make for legal services. Then, if we expect business men to pay us for our time, we as members of the legal profession, I submit, must handle this valuable asset of time in a business way. We cannot expect business people to pay us for two days when the matter should have been disposed of in one day. Nor can WE afford to lose this extra day—consequently, we must take up the slack.

As Professor Binder has so aptly pointed out, the day is past and gone when members of the legal profession can think only of the service to be rendered and wholly disregard the personal gain. Certainly the PUBLIC has long since quit so classifying and considering the members of our profession. It, therefore, becomes necessary for us to fight to maintain the good name and integrity of our profession.

Unpleasant as it is, we must admit that the legal profession, as such, does not enjoy the confidence of the public. This is an unjust and an unwarranted condition, for, most assuredly, there is no other set of men in any business or profession who are worthy of greater trust and confidence than the members of the legal profession.

But, who is to blame for this condition? No one, except the members of our profession. The condemnation, public and private, goes on, but the legal profession does nothing to counteract it.

The general public seems to entertain the belief that the lawyers are constantly changing the laws for their own selfish ends. That all their meetings and all their efforts are for their own personal welfare.

Now that the practice of law has, voluntarily or involuntarily, become a matter of business, and that it has been so classified by the public, is it not incumbent on us, as members of the profession, to protect and defend our profession as any other business would do? Is it not good business, and is it not only right and fair that we, through our local Bar Associations, tell the public of the honor and integrity of our profession, and of the unselfish service that is being rendered?

What better work can the local Bar Associations do than to hold open meetings occasionally, to which the general public is invited, and at which some prominent attorney will tell the people of the great labors that are being unselfishly and untiringly performed by the American Law Institute in restating the Common Law, and the American Bar Association in securing uniform laws, and many other fields too numerous to mention? And, of the great volume of work that is being performed yearly by the officers and committees of this and other Associations, all for the good of the people at large and not for the personal benefit of the members of our profession.

If the people do not know these things, they are not to blame, for, as a profession, we have never made it our business to tell them.

But, this is not the only good that would and should come from such meetings, periodically held by many local Bar Associations. The correctness of the adage, that "An ounce of prevention is worth a pound of cure," is no more true in the medical field than in the field of law, but the general public has not been educated to this fact. I submit that the legal profession has been derelict in a duty it owes the people in this respect.

We have seen the medical profession during the past few years hold public meetings with outstanding men as the speakers, and the burden of the discourse, almost invariably, is to consult your local doctor. And that something in our head, or elsewhere, that we call common sense causes us to applaud the

profession for advising the people to employ the doctor to keep them well rather than to get them well.

For entirely too long too much of our work has been in the nature of "House Wrecking." The lawyer has been consulted and employed after the "thing" has happened rather than before. We have no right to condemn the client for not knowing that he should have employed counsel for advice before he was in trouble. We have wholly neglected telling the public about the value of preventive law.

If the law is to continue its daily march as the constant ally and companion of business, then, I submit, that it is not merely our privilege, but our duty to educate the public to the value of preventive law, that is, to the value of employing lawyers and paying retainers to keep them from getting into trouble rather than employing lawyers to get them out of trouble.

Considered again from the business viewpoint, the propogation of this idea may result in a reduction in the amount of suit fees, but correspondingly, it must result in an increase in retainer fees. And I am sure every lawyer would much prefer to serve his clients and earn and collect his fees by counseling and advising in the office, rather than by trying cases in the court house.

I have presented these very brief thoughts because I believe it is only good business for the legal profession to stand up and actively defend itself against the many unjust and unwarranted charges made against it; and because it is good business to take up the slack and conserve our time and that of our clients; and, it is good business for the profession to let the public know the value of the service it is prepared to render. It is good business because it will increase the amount of our fees, and this ought to be of interest to the members of a profession, whom Mr. Shakespeare said, "Dreams Straight O' Fees." I thank you.

PRESIDENT CURRIE: I have the great pleasure now to present to you Justice McGowen, of the Mississippi Supreme Court.

JUSTICE J. G. McGOWEN: Mr. President, ladies and gentlemen of the Mississippi State Bar Association:

I have been listening to the quips and pops of the speakers as the Court to which I belong has been referred to and can understand why my good old friend, Judge Anderson, suddenly took sick yesterday and dreamed that he was going to be operated on in a hospital in Memphis, and so he could not come here because he had that dream. And then when I listened to my friend, Jeff Wills, here talk about fees, when he told me yesterday that on one little farm of his down in Jeff Davis county he had shipped 23 carloads of cabbage, and if I am not mistaken, after his story

about it, he had $23,000 to show for it, or something like that; and when I heard him speak here I was almost tempted to go down in my pocket and get the last dollar I had and throw it in my hat and pass it around for him, but I know you won't like that and I am going to save you from any embarrassment about Jeff Wills. He will take care of his clients, and he will make his clients take care of him. (Laughter.)

He reminded me, in his story of his poverty and lack of sustenance and state of papuerism, he reminded me, in his brilliant way of getting across that which at least is subject to comment, he reminded me of the old negro I heard of who was on trial for stealing a watch. When they put him on the stand, every time the lawyer for the State would ask him a question he would repeat the whole question over, because it was a very embarrassing situation as to how he came by that watch. Finally he told his story that he had found the watch buried six inches under the ground behind Mr. Johnson's grocery store in a dark alley on a dark night. And so the judge said, "Now, Eph, you testified you found that watch behind Mr. Johnson's store?" The old darky says, "Yes, sir." "And you say you found it in a dark alley?" "Yes, sir." "And you say that it was a dark and rainy night?" He says, "Yes, sir, Lord, it sho' was a dark and rainy night." He says, "Well, now, Eph, will you tell us where in the world you found that watch?" He says, "Boss, does you want to know where I found that watch?" He says, "Yes, Eph, come on and tell us where you found that watch." The old darky says, "On a dark and stormy night, behind Mr. Johnson's store, boss, as sure as I am sitting here, and it was buried six inches under the ground." Well, he says, "Eph, will you please tell us how you found out that watch was down there six inches under the ground?" He says, "Boss, you wants me to tell you how I found out that watch was down there behind Mr. Johnson's store six inches under the ground?" He said, "Yes, out with it, Eph, out with it." And so the old darky says, "Boss, I heard that watch ticking, that is how I found it." (Laughter.)

When my friend Jeff Wills tells us he is about to starve on the kind of fees he is collecting, I want to say that he comes from Hattiesburg, from the same place from which hails our distinguished president, and the president, when he put him on to speak on this subject, put him on because he knew he had a past grand master upon the subject of

being able to collect fees from clients who were able to pay. He picks his clients.

Now, then, I was very much embarrassed when I read in the newspapers on this program that I was to speak on the Rules of the Supreme Court. Why, I have not memorized but one rule down there and that is a rule of evidence, and so you gentlemen will know that I am not yet very familiar with the rules. But I do intend to speak for the court as to how a case is handled, in order that some rumor and some misconceptions of how the Supreme Court handles a case when it is submitted there may be dispelled, and that it may be of some benefit to you, some benefit to the profession, and perhaps be of some benefit to the court itself.

There is an idea abroad that each division of the court —you know the court is divided into two divisions—picks its own cases, and the presiding judge of that division picks out the cases that he would like to decide and leaves the others to the last man that comes in. There never was a greater fallacy, even among good lawyers, than that idea which is prevalent I find from talking to lawyers, because I had a dozen letters asking me to tell this Bar Association just how a case was handled.

When a case reaches the Supreme Court and the case docketed, the divisions even do not select their cases, but the cases are assigned by numbers, and the divisions, no division of the court, no member of the court, knows until that docket is printed to which division any particular case will be assigned. I hope that may be understood now once for all. I have even received letters from intelligent lawyers, active practitioners, suggesting to me that it would be a good thing if the case of Jones versus Smith were assigned to Division B instead of being assigned to Division A. It happened to be from a man who practices criminal law, and he thought it would be better for his client to take that chance. I mention that, not in criticism of the lawyer, but to show you how little we understand about how fair the court tries to be. And, of course, we feel, as humanity must feel, all of the judges of the Supreme Court are mere human beings just like you, elevated by you to this position, elevated by your influence to this position, and every scintilla of discredit that is brought upon that court and every whisper against its integrity must rebound upon the fraternity as well as affect the court, and I want to ask you to bear that in mind because

I want to tell you I am in splendid humor. I have ahead of me two or three very splendid invitations for this afternoon and night and I am really feeling good, notwithstanding the fact that nearly every lawyer in the house facing me has recently had a case decided against him by me, and I remember this case now. I had forgotten it before I came here. (Laughter.)

When a case is on the docket and has been submitted to the court, the cases are sent to the consultation room. Not one of the three judges of the division ever sees those cases until they have been listed by the stenographer according to their number, and then the cases are assigned to the Judge by number, and not by name. And I pledge you my word of honor that one-half of the cases in which I have had the honor to participate I did not know the name of the party nor the name of his lawyer while considering the legal proposition to be passed upon by the court. (Applause.)

It often happens that the name of the party is suppressed and the facts are presented to us as nearly in a non-prejudicial and as fair a manner as is possible. Now, then, I want that to go out on behalf of the court, on behalf of the lawyers who practice before the Supreme Court, that there is no such thing as a judge making a choice of a particular record in order that he may handle that which would suit his fancy. As an illustration of that, most of you from North Mississippi know, and I think practically all the lawyers here know that for thirteen years I was engaged in the special business of a chancellor of the State and made a study during all that time of equity and equitable principles. Do you know that of the cases I have handled it has been my lot to handle seduction cases and criminal cases and railroad damage suits under the prima facie statute, and all things like that, for which I have no special predilection or love. I think that the Lord must have sent it upon me to put me in training and my training may have been very expensive to some of your clients. But when the case is sent then to the judge's room, the judge does not know what case any other judge has, except by accident. And he is so busy with his own troubles in his own records—and by the way, I am going to stop right here to say something, and I hope there is some chancellor here who will get it. Do you know that the chancellors of this State are piling up the cost of litigation by not ruling upon the propositions when they are

presented and letting the record be piled up with incompetent testimony, books and pages and volumes of it which perhaps never ought to have been heard, and the chancellor would so decide if he were pressed, but more often he goes on as I did in my early days and forgets the ruling entirely, and the Supreme Court holds the evidence was in.

I make that remark by way of advice, that if I were a lawyer again at the bar and if I were a chancellor again, I would present every question, and if I was the lawyer and if I was the chancellor I would pass on it then and there, and if I missed all right, let it be corrected. That is the best you can do anyhow. Use your best judgment on it after argument on it, if you are in doubt, and then settle it and let the case be tried upon certain legal principles and a course which you have mapped out. I throw that in for good measure because I think it would lessen the work of all of us who have to deal with a Supreme Court record after the chancellor has finished it. I do not say that by way of criticism because I did the same thing myself, and I did not understand how it affected the cost to the litigant, and the work of the lawyer, and the work of the Court, and the work of the stenographer who had to do with it after the lawyer is finished trying the case.

Then the record is ready. Now, listen, there is more talk about that by the members of the bar and the laymen, that is, that the Supreme Court writes an opinion without reading the record. That is nonsense, unless the briefs show that the facts are agreed upon. No man can look at a stack of records and tell what is on the inside of them, or the names of the parties even, or the names of the witnesses. He must of necessity see that record, and he must get the substance of it, the best of which his mind is capable.

When that record has been studied by him, the briefs pro and con examined, the authorities examined, he then takes that record to the law books under his arm and he goes into conference with the other judges upon that record, and the other judges bring their records in there. Then the facts are stated, how the case arose, and the essential facts of the case are stated; then the law points are stated one by one, and those points are taken up and discussed, and the judge who has the record tells what he thinks about it; then the youngest judge says what he thinks about it; then the oldest says what he thinks about it; and if we are *en banc,* with all six judges, it then goes

down the line until the Chief Justice has the last say himself, if he chooses to have it. When that has been done, it very often happens that an examination of an authority or the examination of a brief again will disclose that the judge who had examined the case had gone upon the face of the briefs, and there was an authority against the decision and the lawyers even had fought it out in ignorance of a statute or in disregard of a statute. And I have in mind now a line of cases that has run twenty years with a statute opposed to the cases, that will have to be straightened out, to show you that all of us, with some of the most distinguished members of the bar and some of the most distinguished members of our Court who have gone to their reward, a statute was written on the books all the time, and forgotten.

If I were going to have a group meeting and if I wanted to do the most good to the clients and to the people of Mississippi, I would get back to a revival of old time code study and knowing what your statute law is. It is easy to find a principle when you know what your statute law is, but too often we brief our cases upon some point when the answer to it is in your statutes if you will make due and diligent examination.

When that is all done, every point is voted on by each member of the Court saying what he thinks about it, then it is summed up. Do not think for a minute when you read an opinion of a judge that that is his individual idea. It is not so. But it is composite, it is what all three of the judges think is proper to say in that particular case. Not only that, but after the case has been determined, the judge who handled the record that it has been determined upon for him to handle, sometimes he says, "I can not write that. I can let you write it, but I can not go down on paper heartily endorsing that proposition." Then it passes to another judge who sees the thing enthusiastically.

Then when the opinion is written it is required to be open for inspection by every single judge of the division, and not only that, but it is our duty and we insist that every single judge of both divisions have free access to them. They must be finished by a certain time and no opinion is allowed to go down until every judge has had at least 48 to 60 hours in which to examine what is said. Now, the judge who writes the opinion is responsible only for the language or diction and the grammar. The opinion is the composite opinion of the judges of the Supreme Court of Mississippi,

and it is unfair to give any one judge credit for a certain opinion or to give him the blame for a certain opinion. We all equally ought to be praised alike. It is the common work of the Supreme Court of Mississippi, and we are all responsible for it, and so far as I am concerned, I do not confess any of my weaknesses. It is my duty and I do not desire to shirk any part of the responsibility, which I should justly bear, and that I should bear the burden of every decision which has been handed down since I became a member of that Court, as every other member of the Court.

Now, then, when that opinion is written—let me make this suggestion about your briefs. I believe I can help you men. Agree to every fact you can when you go to brief your case that is not hurtful to your case. You strip it then to the bone and submit the point for decision to the Court without the delay of a long examination and tedious work through the testimony of John Smith and Bill Jones and the other witnesses who were called. And then when you have determined that you have a case that is meritorious for reversal or affirmance, select a point which to you at least is sensible and stand upon it with all the force you have, and in my judgment that is the best way—and I am telling you now of the secrets of the Supreme Court—that is one of the best ways to win a case in the Supreme Court of Mississippi is to get your point in the case and put it squarely before the Court and stand upon it with all the vigor you have, and do not try to confuse your main point by urging just as earnestly some proposition that a boy in the law school would laugh at you if you submitted it to him, or in the face of a statute, or in the face of a positive line of decisions which you know the Court is not going to overrule.

I will make this further suggestion, if I were going to prepare a brief, I would make it a brief. I would not try to write in it everything in the world nor give a history of the world, but I would try to write about that case; I would make my point on that case; I would drive home that point, but I would make on the front page of my brief a resume of my entire brief, in which I would say there are three points in this case, Point No. 1, Statute of Limitations; Point No. 2, Duress, and Point No. 3, Failure of Consideration. And then I would put right underneath each one of those the authorities which I had cited and believed sustained my proposition. When you present a

brief like that and the judge decides it in your favor, he has got an incalculable lot of help on the front page of your brief in which to base a presentment of the facts of your case and the law of your case as to how it was decided, and you, at least, will understand how the Court reached that conclusion. That would be of a very great help to the Supreme Court of Mississippi. It would not take you lawyers more than an hour of time and would be of great benefit to the lawyer because he then learns whether or not he has gone to some digest and cited cases that do not prove his proposition at all but prove the opposite very often and upon which the Court could not rely, but put on the front page the points that you believe to the best of your ability have proved your proposition, and you have written a brief which is helpful to the Supreme Court of Mississippi and helpful to you, and which will make you a better lawyer, because you are then in a measure acting as the Supreme Court judge of your own case.

Mr. President, I am taking more time than I expected. I am a little bit interested in this matter.

PRESIDENT CURRIE: Go right ahead.

JUSTICE McGOWEN: When you come to write a suggestion of error, it is all right if you call me a thief. I don't mind it. I have gotten used to it; but some of those young judges that have been elected and some that will be elected in the future, they may not like it. It does not sound real good. Do not impugn the judge's motives, because you know if you were to go down to one of these ladies and say, "Miss Mary, I want to marry you, but you are the ugliest creature I ever saw in my life," do you think she would marry you? I will tell you she would not, and as a matter of policy I would not put a matter in a suggestion of error that I would not want to say to my wife when I was wooing her for a wife. Why? You want the good will of the Court. The Court wants the good will of every lawyer and of every litigant. It is no easy matter to determine other people's quarrels. It is no light job to settle other people's lawsuits. It is no pleasant task to dispose of other people's property rights, or what shall be their future habitation, whether heaven or hell, we do not know, or send them off to eternity on the decision of a judge. It is no light matter, and I appeal to you in the suggestion of error, if you can not write anything but what is in your brief in the first place, I would

just send down a suggestion of error like the old gentleman did not long ago in which he said, "I haven't read the opinion but I know it is not worth a cent because it is wrong. It is against me." There is just as much sense in that as there is in a great long tirade of repetition of something that was in the original brief.

When the Court overlooks a decision and it is clear, if a lawyer has a case decided by the Court and he says that this case in his opinion is in conflict with the case of Jones versus Smith, and asks the Court to straighten it out, don't you think the Court will do it? We are constantly sustaining suggestions of error that have been presented.

I have made these few remarks without—I did not know there was going to be a stenographer here, or I would not have come either. I would have been like Judge Anderson. I would have concluded that I had better get in the hospital. But I came anyhow, and I have talked to you in all earnestness. I desire to help you, and I ask you to help the Supreme Court of Mississippi. Let's pull together for the elevation of everything that will make Mississippi a better state in which to live, and make us more law abiding citizens, and a more law abiding set of lawyers and better judges from every standpoint, and let's work together and pull together to make the profession stand out in the limelight as the leaders of civilization. (Applause.)

JUDGE A. A. ARMISTEAD: Mr. President, before Judge McGowen takes his seat I want him to explain something that I am entirely at a loss to understand. I do not know whether you would call it a rule of the Court or a decision of the Court. He has not explained exactly what I am after. I had a case where the Chancellor just kept reserving his rulings all day long, and finally I made a motion for him to rule on his reservations, and then he says, "That is reserved." I have gotten confused on the old idea of trying to retax the costs in the Supreme Court. The old rule, as I understood, was that it provided—our Supreme Court has rendered a decision that the taxing of the costs is an act of the Court, and the fixing of the costs is the act of the Clerk, and that you have to apply to the Court by a motion in the nature of a suggestion of error, within ten or fifteen days, whatever it is, get that motion heard. Now, what I do not understand, if I do not make my motion to the clerk to retax the costs, but I make a motion to the Court, I can not distinguish that

from a motion by the Court to modify the judgment. Suppose I make a motion to the Court to modify the judgment in so far as it taxes the costs against my client that were improperly taxed, as the case may be, wouldn't the Court have to pass on that motion, and if that is true I know of no rule of the Supreme Court that requires that kind of a motion to be made in fifteen days. Now, a motion to retax costs is a suggestion of error. It is not debatable, except that there is a way of calling it up. I don't blame them for that because you hear so much speaking, but it is not debatable. I do not know whether a motion to modify a judgment would be debatable or not. I would thank you very much if you would explain to us all what that means. Has the Court departed from its former holdings? Having practiced before you as one of the distinguished chancellors of this state, and for whom, as you know I retain the very highest esteem and regard, I wish you would please tell us about it. (Applause.)

JUDGE McGOWEN: I will just answer my friend, Mr. Armistead, by saying that, in the first place, my opinion would not be *ex cathedra,* it would not be the opinion of the Court. In the next place, as far as I can remember, every time he has made a motion to retax the costs before the Supreme Court he has been very successful. Every single time it has been sustained, and he ought to know as well as I. (Laughter and applause.)

GOVERNOR BREWER: Mr. Chairman, I want to say to the Association and our guests that an unfortunate state of affairs has arisen over here in Oxford. Federal Court was in session there a week or two ago and the Judge's daughter was stricken and necessitated his passing the Court for a day or two, and he was called to the bedside of his daughter and the Court had to be dismissed for the week. He had some very important cases on hand, and he intended to be here—Judge Allen Cox—at this Association, but this trouble arising necessitated his holding the Court over this week or part of the week and making it impossible for him to be here, and I wanted to explain to the Bar Association why he was not here. In the next place he expressed his extreme regret at not being able to comply with the request of the Bar Association that all courts be suspended during the time of the session of the Bar Association. This necessitates your humble servant taking a departure this evening or tonight and being in court there tomorrow, as I have an important case there. I have tried

every way known to human ingenuity to try to keep out of being there tomorrow in order that I might be here, but I wanted the Bar Association to know that the other members of the bar here in the city will take a great deal of pleasure in seeing that you are as royally entertained as possible for us to entertain you, and I want to apologize to the Bar for having to leave tonight so I won't be here tomorrow. I want you to all enjoy yourselves, and I want to apologize for my own absence tomorrow. I thank you. (Applause.)

PRESIDENT CURRIE: We regret very much, Governor, the unfortunate circumstances that carry you away and that keep Judge Cox from being in attendance here with us. The lawyers of Clarksdale and these people have been very hospitable to us here. We have all enjoyed the session, I think, very greatly. I think I speak the sentiment of all the lawyers when I say we appreciate the faithful efforts of the gentlemen who have spoken this afternoon. We are certainly glad, Judge McGowen, to have you with us.

JUDGE McGOWEN: I feel better now, sir.

PRESIDENT CURRIE: Reports of committees are next on our program. We will have the report of the Standing Committee on Jurisprudence and Law Reform, Judge Stone Deavours.

JUDGE DEAVOURS: Mr. President, the committee report is not ready yet. Would you let it be heard later?

PRESIDENT CURRIE: All right. That report then will be presented later. Next is the report of the Committee on Judicial Administration and Remedial Procedure, Mr. Shands, chairman.

HON. A. W. SHANDS: Mr. Chairman, and member of the Bar Association, it has been impossible to secure a full meeting of this Committee. We have had one or two dates set, but we have not been able to get together. We tried to discuss some of these matters by correspondence. The committee is composed of Judge Allen Cox, R. W. Heidelberg, Luther L. Tyler and W. L. Guice. The committee has not agreed as an entirety as to all the recommendation that are presented to you for consideration and as are printed in the April copy of the Journal. The report is as follows:

"To the President and Members of the State Bar Association:

"Your Committee on Judicial Procedure and Remedial Reform, being impressed with the idea that all Judicial Proceedings should be designed to

attain the closest approximation to absolute justice, that is humanly possible and to secure the substantive rights of all the citizens of the Commonwealth, guaranteed to them by the statutory and common law of the State of Mississippi, and that the remedies prescribed by the statutes and usages should be such as are best calculated to attain these ends, beg leave to submit the following:

"First: We are of the opinion that the rule, prescribing the time for the filing of briefs in the Supreme Court, should be changed so as to require the assignment of errors and brief for appellant to be filed not less than thirty days before the day set for the call of the case on the Supreme Court calendar; that the reply brief of appellee should be filed not less than fifteen days before the call; and that the rejoinder brief of appellant should be filed not less than five days before the oral argument. Briefly, our reasons are: Appellant can begin to draft his brief at his most convenient time after the filing of the transcript, this giving him plenty of time; we think the appellee should have more time than the one week now allowed, as he has no control over the time of the filing of the appellant's brief, and it frequently happens that the appellant's brief is received by attorney for appellee when he is engaged in the trial of matters that cannot be postponed, so we think an allowance of fifteen days should be given to him after he has the assignment of errors and an opportunity to be advised as to the position taken by the appellant.

"For the same reason we think that the appellant should have more time than five days, now allowed, within which to file his reply.

"We think the rejoinder brief should be filed long enough before the oral argument to permit counsel for appellee to have opportunity to read same and give to the court on the oral argument his analysis of the authorities relied upon by appellant and of the contentions of appellant, contained in the rejoinder brief.

"We are of the opinion that this will be fairer to all litigants and will make the oral argument more helpful to the court."

Now, Mr. Chairman, I move the adoption of the first section. We discussed in our meeting that under the present system we do not know thirty days ahead of time when a case is going to be reached on the Supreme Court calendar, and that, therefore, you could not know when your brief was to be filed. That is a matter of detail. The clerk could just as well send out his docket sixty days in advance as he could send it out thirty days in advance, it being the idea that the attainment of ultimate justice is what we really are all aiming at and not so much as to whether we get through in time to get a vacation particularly on time or not. The present rule is all right for a lawyer that does not have but one law suit, but it frequently happens that some of us have as many as three lawsuits pending in which we are employed at the same time.

The case comes on for trial. We go to the court and tell them "I can't try this case now. I got a brief in the Supreme Court." If you could get as much as two weeks time ahead you can find time to write that brief. You can not write a brief and try a contested case in the court all at the same time. If you go down to the Supreme Court representing an appellee and just after a case is called for

argument, you are presented with the reply brief of the appellant. You might just as well publish it in the Congressional Record or do something else with it so far as any practical benefit that it has. So on behalf of the Committee, with that explanation, I move the adoption of the first recommendation.

(Said motion was duly seconded.)

HON. J. H. COOK: Do the rules of the court give you the right, as a matter of right, to file a reply brief at any time on the day of the argument of the case?

HON. A. W. SHANDS: Up to the time you open your mouth, you can file a reply brief.

HON. H. A. SHOTTS: It seems to me that those things in this report are of interest to all the lawyers all over the state, and I do not see a general representation here from all over the state. So far as I know, I am the only one here from Meridian. I am sure my brother lawyers over there would like to hear some of the things in this report. It seems to me that it would be a whole lot better to have this report published in the Law Journal or in our annual report and let it come up at our next meeting. We ought not to act on these things on the spur of the moment. We ought to give each lawyer in the state a chance to study it out for himself. I want to substitute his motion to adopt that first paragraph by moving that this report be first published in our annual—I believe that is what they call it.

PRESIDENT CURRIE: Yes, sir.

HON. H. A. SHOTTS: Published and held over until the next meeting of this Bar Association for consideration.

HON. A. W. SHANDS: It was published in the April number of the Journal.

HON. H. A. SHOTTS: All of it?

HON. A. W. SHANDS: Our report, with the correspondence.

PRESIDENT CURRIE: The motion of Mr. Shands was made. There was no second, as I understand to the substituted motion. That is my understanding.

Any further discussion? Those favoring the motion will say AYE; those opposed, NO. The motion seems to be carried. The motion is carried.

HON. A. W. SHANDS: I notice a good many lawyers who have given the matter intense thought, but when presented in a brief the court seems never to grasp the idea that I think every lawyer, that I have had occasion to

discuss it with, has about the proper interpretation of the statute. The statute provides that no party shall be a competent witness in his own behalf against the estate of a deceased person. You will recall that in *Whitehead vs. Kirk,* 154 Miss. 766, the court, following one of those strokes of argument of which Judge Edward Mayes was capable, decided that when the legislature used the word "against" it meant "in." Now, this amendment contemplates that upon the trial of an issue, either the heirs at law or the distributees under the will shall be competent witnesses as to the condition or anything else that happened going to the determination of the testamentary affairs. Of course, not to establish contractual relations with the deceased, but simply to determine whether or not this instrument is in reality a valid disposition of the estate of the decedent made by him during the life time, it being the opinion of this committee as a whole and of virtually every lawyer I have discussed it with that the Court in the original decision in *Whitehead vs. Kirk* was wrong. The Court has now gone to the extent of saying that a man who takes under a will is disqualified as a witness.

Now, it occurs to me that our present Court in following this precedent, this construction in *Whitehead vs. Kirk,* has launched into a fallacy and one that is disastrous as to results, so that no person, no physician, no man holding a license in the State of Mississippi could come in and testify. Of course, the only other people who would know about it would be the heirs, the heirs being disqualified to testify. Then they have gone to the extent of holding that the distributees and legatees can not testify, so that they have made it impossible under these two sections, as construed by the Supreme Court of the State of Mississippi now not only—not to set aside a will of a person who did not have the testamentary capacity, but you can not even have the fun of going into court and trying to do it. You are absolutely precluded. We think we should correct that error by an amendment to be tacked onto the original section so as to make it clear that it is not the intent of the legislature that any Tom or Dick perhaps of a father who has died and left an estate, and they want to litigate between themselves as to which one of them is entitled to the estate, one claiming under the will and the other as an heir, that this statute which says that you shall not testify against the estate shall not shut the mouths of either of

them in a controversy between themselves. You are going so far now as to shut the mouths of both.

HON. GEORGE BUTLER: If *Whitehead vs. Kirk* was carried out to its logical conclusion, wouldn't it preclude a son from testifying that he was the son of his own father?

HON. A. W. SHANDS: I don't think there is any question about that. In fact our Supreme Court in the case of Taylor against somebody have held that a woman could not testify that she was married to a man who died. I think that is about it. I move the adoption of the amendment as set out in the second section of this report, amending Section 1917 of the Code. (Said motion was duly seconded.)

HON. J. H. COOK: Will you read the amendment?

HON. A. W. SHANDS: The amendment reads as follows:

"Nor shall it apply upon the trial of the issue devisavit vel non, to any party undertaking to establish his or her right, to participate in the distribution of the estate of a decedent, whether an heir at law or a distributee or legatee under an alleged will."

HON. J. H. COOK: I haven't the statute before me, but as I understand, you are putting that proviso or clause at the end of the statute as it now stands?

HON. A. W. SHANDS: Yes, sir, for the purpose of making it impossible for anybody to take *Whitehead vs. Kirk* as a correct pronouncement of the law.

HON. J. W. CUTRER: It restores the law as it was before the decision in *Whitehead vs. Kirk.*

HON. J. H. COOK: I am agreeing with the general proposition—I haven't the statute before me, but I have a general idea in my mind what the statute says. I am afraid you may amend the statute in the wrong place and cause some trouble. My idea—is that your idea—is to change the meaning of the word "against" so as to construe it to mean that it does not mean "in," is that it?

HON. A. W. SHANDS: No, not in all cases. If a man is dead and I may be suing him on a contract. That is testimony against his estate. We do not undertake to change that at all.

HON. J. H. COOK: It is limited to certain cases, is my idea.

HON. A. W. SHANDS: On the issue of devisavit vel non, which is a controversy between people who are alive.

Mr. Cutrer states that it puts the statute exactly back where it was before the decision.

HON. GEO. BUTLER: I don't know whether the matter is open for discussion or not.

HON. A. W. SHANDS: There is a motion and a second.

PRESIDENT CURRIE: It is open for discussion.

HON. GEO. BUTLER: I would like to make this observation upon the proposition. I think that the proposition so far as it goes is proper, but I am afraid that the proposition does not go quite far enough. The purpose of it is, as I understand, to put the law of Mississippi back where it was before the decision in *Whitehead vs. Kirk.* Now, if you follow *Whitehead vs. Kirk* to its logical conclusion, in a contest between claimants to an estate, where the decedent died intestate, the parties who claim to be heirs of the dead man could not testify. So while you would relieve the situation so far as the dead man dying and leaving an instrument that was claimed to be a will, is concerned, that is all right. But if a man dies and does not leave any will, if you follow *Whitehead vs. Kirk* to its logical conclusion, it means that I can not testify that I am the son of my father. In other words, my father dies intestate. I claim to be his son. The rest of the members of the family say I am not his son. I can not testify I am my own father's son. Of course, the Legislature never intended any such ridiculous result as that. And if you do not go further than the proposed amendment you will have the rule announced in *Whitehead vs. Kirk* abolished so far as contests of wills are concerned, and not so far as a contest in regard to relationship where there is no will.

HON. A. W. SHANDS: I think Mr. Butler's observation is well taken. Of course, in the case of *Covington vs. Drake* the Supreme Court held—reported in 69 Miss., I believe, the court held a woman could not testify she married a man; then after *Whitehead vs. Kirk* was decided they decided that a wife could not testify ——

HON. GEO. BUTLER: That is the point I had in mind.

HON. A. W. SHANDS: I think that covers it.

JUSTICE V. A. GRIFFITH: Mr. President, since the question has come up, I think it might be well to have it go further than this resolution. We are heartily in sympathy with this proposition, but the Code Commission is of the opinion that this resolution does not go far enough. I can not repeat you the exact language of the section as we have

agreed upon it that is going to be recommended in the new code, but we would not like the Bar Association here to take any adverse action. We think this resolution is along the proper line, but it does not go far enough.

We ought to go further than this report and remove the disqualification altogether. I can't repeat it; I am sorry I haven't it here, but the language is about this: That a party shall not be disqualified as a witness to testify to establish his claim against the estate of a deceased person or his defense against it, likewise any claim he has against a person non compos mentis or in defense; provided, however, that the court may wholly disregard such testimony, and if they disregard it, it shall not be assignable as error; and, provided further, that the declaration of the decedent is made in good faith and shall be received in evidence and the hearsay rule shall not be in effect. To let the parties testify, but the trier of the facts, if he thinks something is wrong with the testimony, to disregard it, and if he disregards it, it is not to be assigned as error.

I thought I would rise and tell you about what we are doing on the Code Commission along that line.

HON. A. W. SHANDS: Mr. President, in view of the remarks made by the gentleman here, I move you that it is the sense of the Bar Association that the general idea set out herein is proper, but it does not go far enough, and that the report in so far as Section 2 is concerned be recommitted with directions to the Committee to rewrite Section 2 of the report and report it back at a later session of this Association.

HON. GEORGE BUTLER: I second the motion.

PRESIDENT CURRIE: You withdraw your other motion?

HON. A. W. SHANDS: Yes, sir.

PRESIDENT CURRIE: Those favoring the motion will say AYE; opposed, NO. The motion is carried.

HON. A. W. SHANDS: Gentlemen, here is another one. I don't know whether the Code Commission has had any changes under consideration or not.

"Third: We are of opinion that Section 7455 Hemingway's Code, 1927, being Section 3695 of the Code of 1906, should be amended by making the period at the end of the existing section a comma, and by adding the words, or others synonymous therewith: 'And excepting those cases in which the patient has put his physical condition in issue in a pending law suit and he himself testified, in any case civil or criminal, and except in case of a contested will in which an issue is made between the heirs at law of the patient and those claiming as legatees or devisees under the last will and testament of such patient, as to the physical and/or mental condition of such patient'."

Mr. Tyler concurs in this recommendation to the extent of adding the words "and excepting those cases in which the patient has brought his physical condition in issue in a pending law suit and he has himself testified," but does not concur in the balance of this third recommendation.

Now, our idea about that is this, that the purpose being now to keep or have in mind that the sole object of the trial of a lawsuit in any case is to attain justice, keeping further in mind that before any man is permitted to testify in any case he must solemnly call God to witness that he is going to tell the truth, the whole truth, and nothing but the truth.

If his physical condition is the thing that is being inquired of and he goes on the witness stand, taking that oath and testifying as to his physical condition, he has done either one of two things, he has already rendered known that which theretofore had been secret, or he has sworn a lie and undertaken to perpetuate a fraud on the court. We think that if he told the truth, a communication from him as to matters that are pertinent from that issue should be kept secret, if this man has already told the truth. We think if he is the kind of a man that won't tell the truth about it, if he has sworn to a lie about it, then certainly he shouldn't be permitted by that lie to perpetuate a fraud on the court and on the other party litigant. So we say there is no sense or reason in the world for the continuance of a statute which prohibits a person from testifying as to confidential communications where the party himself has already called God Almighty to witness that he is telling the truth and the whole truth about it.

HON. D. W. HEIDELBERG: I am heartily in favor of it, and unless some member has compared the amendment suggested with the statute, I apprehend that somebody will not understand the exact significance of the change. I suggest that you explain about that change indicated to me.

HON. A. W. SHANDS: Originally the statute disqualified a physician from testifying in any case, and the construction of the Supreme Court in the Simpson case was whether he was his physician or not. This is another way in which our Court seems to have gotten started skidding down hill, and they went on off. In the original section it provides that any communication from a patient to physicians shall be privileged; he shall not testify about it in any case. The Court has gone so far now as that if a man

who is not his confidential physician but is a physician and happens to see him while his license is in good working order, then he can not testify about it. But the purpose of the amendment is to leave all of that thing secret, if I have gotten into some disgraceful affair and my physician knows about it, and I am testifying in another man's case, or testifying in my case about some contract or something that does not involve my physical condition, that is still privileged. But the purpose of the amendment is to open the mouth of anybody who knows my physical condition if I have already testified in that particular case as to my physical condition.

HON. BOONE: Mr. President, I am opposed to that amendment.

PRESIDENT CURRIE: Do you make a motion, Mr. Shands?

HON. A. W. SHANDS: Yes, sir.

PRESIDENT CURRIE: Was the motion seconded?

HON. BOONE: I am opposed to that amendment. During the past eight or ten years attempt has been made to change the statute in the Legislature. Take for instance physical facts surrounding many law suits, and the circumstances often govern the wisdom of legislation. Take, for instance, a woman gets hurt, falls on the railroad down here at the depot. She lives in Clarksdale. Her life is at stake. She has her family physician, an honorable man, a man in whose hands she places her life. She brings suit for damages. Immediately after the accident another doctor comes probably to administer first aid, employed by the defendant whom she sues, a man who is employed directly, representing his employer or his client, employed for this purpose, employed to be there, to get there, to be there right now, to get there first, and very generally is there first. And then that physician goes on the stand, and her physical condition is bound to be an issue in the suit; it is the basis of the suit; and the family physician goes on the stand, and will open up an avenue between doctors, and the other doctor can go on the stand, and they generally differ.

JUDGE McINTYRE: Do you think it would be fair to either party to have one testify and then decline to let the other one testify?

HON. BOONE: I think the doctor in whom she places her life, places her life in his hands, a man in the community, in whom she has confidence, is better enabled to tell

the truth than a man employed or a physician employed merely for the purpose of going out and getting there first for his employer when an injury happens.

HON. A. W. SHANDS: Wouldn't that be a question that the jury should pass upon and determine the credibility of the witness?

HON. BOONE: That may be true, but this statute has been in force in Mississippi, it has not been changed recently by the Supreme Court. There is no recent Supreme Court decision which has changed the holding on that statute. It has been a statute in Mississippi all the time. I do not think the corporations and other interests have been jeopardized in Mississippi in the last few years on account of damage suits, and I do not see any necessity at this late day in asking for a change in that statute. To many a poor person it is a protection, and generally if you bring a damage suit you bring the family physician in the home town who knows the patient and who knows his peculiarities and who knows his condition and is better enabled to testify than would be a corporation doctor employed for the very purpose of going there to see what he can find out and do what he can, employed for the very purpose of finding out what he can that in the event there is a law suit might be brought against his employer.

HON. F. D. HEWITT: I want to ask a question, if an amendment would be necessary. I see no objection to the adoption of this resolution, because if it is fair that the plaintiff's doctor testifies, the company has the same right to put their doctor on to testify, it would probably be fair. I want to ask this question, has the Supreme Court decided that this statute applies to criminal cases as well as civil cases?

HON. A. W. SHANDS: I do not know.

HON. F. D. HEWITT: We had that question up in a criminal case. I would like for the resolution to be amended so as to provide that it shall not apply to criminal cases.

HON. A. W. SHANDS: To civil or criminal?

HON. F. D. HEWITT: To civil or criminal.

HON. A. W. SHANDS: I think that is proper.

HON. F. D. HEWITT: So as to clarify that.

HON. D. W. HEIDELBERG: I just want to say, just as an illustration of what a hardship the law works. There was a case that occurred in Wayne county a few years ago in which a man had his leg hurt. He sent for

his home physician, and there was another physician or two knew all about the circumstances. The lawyer representing the plaintiff in the suit against the corporation sent to Meridian and got an expert. The only two physicians that knew a thing in the world about the case were absolutely prohibited from testifying during the law suit. An expert witness living in Meridian who never saw either of the parties in his life before was a competent witness. I submit it is unjust to disqualify a man of unimpeachable integrity and character who knows all about the facts of the case and who is the only person who knows about the case, and then permit an expert witness to testify who never saw the parties before.

JUDGE McINTYRE: If the members of the Bar Association will get away from the idea that this law only applies as between corporations and individuals, they would have a different idea about it. This law applies between individuals as well as it does between an individual and a corporation. The construction placed upon this statute is vicious, and the only way to get away from it is to amend the statute. Why should we holler secrecy when there is no secrecy, when the whole thing has been opened up? I had a case in my experience where a fellow claimed that he had been hurt. He went to three physicians in the city of West Point and they would not agree with him at all, and he went to Meridian and got a physician who would testify as he wanted him to testify, and we were forced to compromise by reason of that fact because the facts could not be brought out.

JUDGE W. W. VENABLE: Personally, I think the whole policy of the privilege between physician and patient is founded on an unwise conception. I personally think it is wrong. I would vote, if I were in the Legislature, to repeal the statute altogether. We started out with the idea that certain relations were of a confidential character, and that general good was promoted by encouraging communications which would naturally flow if that relationship were held sacred, and since a withdrawal of the privilege would destroy the chances of those communications being made as between lawyer and client, it was thought that it was well to grant the privilege. The only basis for the privilege is that human experience has shown that the public good is best promoted by having them, for instance, communications between lawyer and client. And the fundamental inquiry is, is the public good

promoted by having the privilege between physician and patient? It seems to me it reduces itself down to a practical proposition. Does that as a matter of fact promote the public good?

Now, then, I am injured. I call in a physician, and our Supreme Court has construed that statute as meaning that that physician shall not only not testify about my physical condition, but he can not testify about anything that he learned by virtue of that relationship. He can not even testify it was a rainy day if he discovered that after he started to make the call. Now, then, as a matter of fact, does that promote the public welfare? You take the case. Suppose his testimony is favorable to me. I put him on. Suppose his testimony is unfavorable and suppose my claim as a matter of fact is not well founded? The chances are I will refuse to put him on. Why should I be given the privilege of refusing to put him on? If the trial of a law suit is the pursuit of truth, why should the court shut itself off from an opportunity to learn what the truth is? But the legislature says to us, "you shall not hear the facts." Now, then, if the facts are favorable and I am an honest man, and the physician is an honest man, if his testimony is favorable I put him on. If it is unfavorable and the witness or man who knows the most about it won't testify in my favor, I am given the privilege of keeping him off, the very time I ought to put him on if you are going to get the truth about the matter. The only possible case that that would be justified is this, on the assumption that the physicians of the country are so dishonest as a rule that many of them, though I am grievously hurt, would get on the stand and swear that I was not. That is the only basis for excluding it, that he would lie and that he would tell a lie against me. Now, are the physicians of the country so dishonest? I do not think so.

HON. GEORGE BUTLER: Will you let me ask you a question, Mr. Venable?

JUDGE VENABLE: Yes, sir.

HON. GEORGE BUTLER: Suppose there was a wreck out here on the Y. & M. V. Railroad and passengers were injured. The Y. & M. V. Railroad brings a doctor on the ground who immediately goes to the scene of the accident and administers to the patients. Now, the patient sues the railroad and gets on the stand and testifies that he was injured by having his leg broken. Do you think it right and fair for the railroad company in that kind of a case to be

privileged to call its own physician who had examined the patient under those circumstances, do you think that would be fair?

JUDGE VENABLE: Absolutely. I don't think there would be one time in a thousand where a physician would come in and say a man had broken his leg when he hadn't, or swear he didn't break his leg when he did. The whole thing goes back to this. To start with, the chances are in the case you put, as soon as the man gets hurt he is going to have his own doctor treat him. Now, why not have both men testify? In other words, in every trial you have testimony of all sorts and kinds. It is the function of the court and jury to sit and hear the testimony to arrive at the truth. The only basis that you can exclude this man on is the situation is such that he would get on the stand and probably deny it because you say he has an interest. I do not think that happens frequently enough to base any rule of action on. Let all the witnesses testify. Let the court get all the testimony from every source that it can, every type and kind of witness. The jury can tell pretty well whether a man is lying or not. You understand I never represented a railroad and I do not represent any of them now. I have no prejudice for the railroads or against them, but I think it is wrong in policy. I think nine out of ten of our privileges are founded on unwise policies. I think the wise policy is to let the court have all the information from all the sources possible, get all the facts of every kind and character or source it can, and then decide what the truth is. The whole court trial is on the assumption that we are able to do that. The only justification for a court in the world is that it has the capacity and the ability to take testimony of all kinds, conflicting testimony, testimony from all sources, and from it adduce the truth.

HON. H. T. ODOM: I heartily concur in what Judge Venable has had to say with reference to the amendment to this statute. I am unable to see how any attorney who is willing to try his case fairly on the facts would be opposed to such an amendment. I want to suggest this, however, that possibly the amendment as suggested does not go far enough, if I understand it. As I understand the amendment it is proposed in cases where the injured party takes the stand himself and puts the matter in issue. It seems to me that the amendment should be broad enough to cover all cases where he has put the matter in issue, whether

by virtue of his own testimony or by virtue of the testimony of his own physician.

HON. F. A. CRITZ: I want you, please, to think about this point. Suppose somebody is badly injured in some sort of an accident. Is it right, with that person in that perhaps critical condition for a physician to go there and examine him and make a diagnosis of that case, a diagnosis that not only takes in the physical examination of the body itself, but takes in statements that that party might make in that critical condition? Is it right for a physician to go on the stand and testify as to what that party did in that injured condition, which might put his mental condition for the time being in a condition of non compos mentis or partly non compos mentis, or as that of a child? That is the objection to this point, is to letting in any testimony where a physician goes to see a party under those circumstances.

HON. W. E. GORE: Mr. President, if there are any sacred relations in this life, it is the communication of a patient to his physician. If there is anything on this earth about which the veil of secrecy should be shrouded it is that. If a man can not tell and a woman can not tell her doctor anything that it is necessary to tell him, or that it is best to tell him, then you have reached a bad state of affairs. I am put in the attitude of doing here now what I very seldom do and that is taking up for the Supreme Court. The Supreme Court of the State of Mississippi has not gone too far on that question. Leave out all questions of corporate interest and boil this thing down to a proposition of honesty. If a man can not communicate any kind of information he wants to to his doctor, then you are taking away one of the safest means of preserving human life, and I do not agree with the assumption and with the positive statement of Judge Griffith a while ago that any man can tell when another man is lying. He may do it sometimes and he may be mistaken about it sometimes. I have been practicing at law for around nineteen years, and I sat in justice court one day and saw a man swear to what I knew was a lie, flat, over the board, and it was not the first time he had done it in my presence. I had known he had lied in the other case, and he swore that he never heard of nor received two life insurance policies when I had the receipts in my pocket with the numbers on them, with his signature to them. And if I had not had them in there and taken them out when he was testifying,

I would have believed what he said about it. Any man that tells you that he can tell when a man is lying has got more than one point on me.

HON. A. W. SHANDS: Mr. President, that was not with reference to the matter that is before the Association now. That was with reference to a matter that has been passed upon. Now, will you permit this observation also, this amendment does not go to say that a man shall not tell his physician anything in the world he wants to, or that a woman shall not tell a physician anything she wants to, but it says that they can not come into court and lie about what they have told him after they get through.

HON. W. E. GORE: You can put a pretty high price on keeping the doctor's mouth shut, though. You can put a man who is entitled to a money verdict in such an embarrassing situation, and there is not a man within the sound of my voice that at some time or other in his life may have had such an embarrassing situation, by having all of the family skeleton dragged out by some railroad lawyers or any other kind of lawyers, I do not care what kind, and rehashed and a man brow beaten. Is there anybody in this room simple enough to think that you can take a matter to court and get even handed exact justice out of it at all times? I do not believe you do it half the time. Now, if a man can not say to his doctor anything he wants to and have that doctor's mouth closed, then we are in a deplorable situation, and he will be placed between the two things of having his grievance unredressed or having things in the nature of a defense which may affect him or may have at some time affected his life brought out, and exposed and commented on by whoever takes a notion to and wants to comment on it in the courts for the balance of his life.

Now, no man with any brains at all expects absolute justice in this world. He ought to be bored for the simples if he does. He has not lived as long as I have, and I am not an old man. But a man is put to this choice when he is injured of having whatever communication he has made to his doctor—and he had as well to make one as to have an examination, and lots of times an examination is better, or forego the redress of his grievance, and that is especially true when it comes to a woman. There can in my judgment be no reason to put any such change as this in the law with reference to this proposition. If a man or woman can not talk the truth to his or her doctor, then I

ask you, who may in justice hear the truth? If this thing stops at the proper place, this kind of an examination stops at the proper place, it might be very well said to be proper, but it is my experience and observation for a longer time than I care to tell you that a lawyer, on whatever side of any question that he is placed, will go to the barbed wire fence, just like you or I, and I do not care how far it is, he will go to it and try to break it down, and there is no limit to what can be proved or insinuated or deduced.

Now, sometimes we are getting along a whole lot better than we think we are, and I do not see anything wrong; if a man can not tell his doctor the absolute facts, not only as to his situation, but as to all other situations that are involved in the whole history of his life, then in the name of God who can he go to? I am not one of those who claim to be able to tell when a man is lying, because I have had them to put fast ones over me many a time. And you get me, if there is any relation in this world that ought to be kept secret, it is the communication of a patient to his doctor. Now, we can go on and argue with every reason to support the proposition that a man's lawyer has got to go on the stand and tell all he knows about a simple case where a man will tell you he did not steal a turkey on last Thursday night.

HON. A. W. SHANDS: Mr. President, I arise to a point of order. Haven't we a limit on these speeches?

HON. W. E. GORE: The other side of this question, Mr. President, has been monopolized for about an hour.

PRESIDENT CURRIE: The by-laws prescribe a ten-minute rule.

HON. W. E. GORE: I submit to the rule.

HON. GEORGE BUTLER: When I read the report of this Committee in the April Law Journal, I deliberately made up my mind that I was not going to have a single word to say up here at this meeting, if I came. I am not like some of these gentlemen, in this, that I can see a very strong and urgent reason to be presented in favor of the amendment of this statute—a great many of them; and on the other hand, I can see a great many reasons on the other side of this proposition. I do not think it is all one-sided by any means. I do not think it is exactly fair to impute to a lawyer who does not agree with the proposition that he does not want to be fair in his law suit. I think we all want to be fair. I think the proponents of

this measure want to be fair, and I think the people who oppose it want to be fair, but it is a different way that we approach the situation and with a different viewpoint. We have been discussing this thing at every meeting for ten years. We have had some argument at every meeting, one side proposing, and the other side opposing, and we are not getting anywhere; we are not making any progress. We are not doing this Association any good by this kind of a proposition, for this reason: Who are the members of this Association, generally speaking? Is it the average practitioner over the State of Mississippi? It is not. Why isn't the average practitioner in the State of Mississippi a member of this Association? Because he feels —not justly so, in my opinion—that this Association is run by and for and on behalf of corporation lawyers, and, therefore, he does not come in.

Now, we come up here and the corporation lawyers as a general rule are in favor of this proposition. The fellow on the other side, generally speaking, is opposed to this proposition. I do not represent the plaintiffs in any personal injury cases. If I had a purely personal preference in the matter, it may be that I would favor this proposition. But I do not do that. I can see many, many reasons why it should not be just in given situations—not in all, but in some—to apply the rule permitted by this statute as submitted.

This is an age of insurance. Every man—not every man, but a great many men, and nearly every business institution has some kind of insurance, liability insurance. That liability insurance company has its own physician, and if an employee has a finger mashed, or gets his head bruised, or toe cut off ——

HON. A. W. SHANDS: Will you permit a question?

HON. GEO. BUTLER: Yes, sir.

HON. A. W. SHANDS: Did you ever see one of those in your life in which the plaintiff did not waive that privilege before the insurance?

HON. GEO. BUTLER: No, sir. You are talking about one thing and I am talking about another. I am talking about the ordinary liability policy to protect public liability. A fellow is working in my factory and gets his toe mashed. I have a little factory—it is a very small one. A fellow gets his toe mashed and I take him or send him to my doctor and tell him to treat this fellow's toe. He comes along and sues my little old factory. He says, "I got my

toe mashed." And I take my regular doctor that I am paying and put him on the stand, and he says, "That is not so." Now, I do not believe that is exactly fair. I do not believe in that situation that you get approximate justice, and that is all we can ever hope to get is just approximate justice. Now, that is the way I see the situation, and I am opposed to the change.

JUDGE VENABLE: The case you put, the physician testifies and the injured man testifies?

HON. GEO. BUTLER: Yes, sir.

JUDGE VENABLE: Is there any danger, assuming that the injured man testifies truthfully and the physician testifies untruthfully, is there any danger of a Mississippi jury adopting the testimony of a physician rather than of the injured man? Now, assuming that the physician testifies truthfully ——

HON. GEO. BUTLER: You are asking too many questions. Let's get to one. I can't keep all those things in my mind. Come to your specific question.

JUDGE VENABLE: In the case that you put, do you think there is any particular danger, assuming the injured man testifies truthfully and the physician untruthfully? Do you think there would be any particular danger on the part of a Mississippi jury in adopting the false testimony of the physician rather than the testimony of the injured man?

HON. GEO. BUTLER: I will answer this question by stating a proposition that your client makes certain statements to you in regard to his law suit, and he is placed on the stand and on cross-examination Mr. Shands, says, "Didn't you tell your attorney so-and-so?" And he says, "No, sir." And then Mr. Shands has the privilege of putting you on the stand to contradict him. Is that fair?

JUDGE VENABLE: Not between attorney and client.

HON. GEO. BUTLER: I do not see any difference. Your proposition was to remove the bar that you ought not to have any privileged communication, and, therefore, you are going to destroy in one breath a system of jurisprudence that has been built up all through these years. I say it ought not to be done, and in my judgment the best policy is to pursue the one we are pursuing now.

HON. D. W. HEIDELBERG: I move the previous question.

HON. W. E. GORE: Mr. President, those favoring this question are given all kinds of opportunity to discuss it. I

insist that this matter be postponed until tomorrow, that those opposing it be given an opportunity to talk about it.

HON. H. A. SHOTTS: Second the motion.

HON. C. L. TUBB: Mr. President, in the course of my practice I have had occasion to be on both sides of this subject. I have had cases in which I wished I could have called the physician, and as a general rule when the plaintiff did not put the physician on, the presumption is generally that he will not support his patient. Mr. Butler has expressed my convictions about this proposition. We are liable to go too far in letting down the bars, to repeal statutes that the legislatures of the various states of the United States have had on their statute books for hundreds of years. I think we ought to let this thing alone as it is. Under present conditions the injured man or the man who has employed the physician can call him if he wants him to speak in his behalf at the trial. If he is dead, that privilege can not be released, and it can not be released under this amendment he has here now. As suggested by one of these parties here, Mr. Critz and Mr. Boone, and as suggested by Mr. Butler, if I get injured on this railroad down here—and I say I do not represent any railroads; I am like Judge Venable, I do not owe them anything and they do not owe me anything; I pay them when I ride on their trains, and sue them when I get a chance. But I represent some other corporations and in that relation I would like for this thing to be reversed. We want justice and fairness. If I get hurt on the railroad down here, as a general rule the company physician is always at hand and first aid is administered, and they carry me out here to this hospital, and perhaps they keep me there ten or fifteen days and sometimes thirty days. I may make many statements while there. I am not in the care of the family physician that I employ. Yet under this amendment that doctor who is not retained by me, who is employed by somebody else, can come into court and tell about my ailments and what he discovered in treating me. The statute we have is now designed to prevent that sort of thing, unless I see proper to bring the physician into court myself. I say we ought to let this statute alone. It does not need any amendment. It works justice, as a rule, as nearly so as it can prevail, and we ought to permit it to remain like it is, and I move to lay this amendment on the table.

HON. H. A. SHOTTS: Second the motion.

PRESIDENT CURRIE: Judge Heidelberg made a

motion calling for the previous question, which was seconded, I believe before I recognized Mr. Tubb. You make a motion to table the amendment, Mr. Tubb?

HON. C. L. TUBB: Yes, sir.

HON. A. W. SHANDS: This is a matter of considerable concern to us, it is now past the adjourning hour, and it occurs to me that I have a right to close the argument, but nearly everybody has gone, there are just a handful here, and I think we should dispose of this matter so that a vote would reflect what is the sentiment and wish of the members of the Association, in view of which I move that we do now postpone further consideration of it until tomorrow morning.

HON. H. V. WALL: Second the motion.

HON. C. L. TUBB: I move it be postponed then until tomorrow morning.

HON. H. A. SHOTTS: Second the motion.

PRESIDENT CURRIE: Those in favor of the motion will say AYE; opposed, NO. The motion is carried.

SECRETARY JIGGITTS: I have here the report of the Special Grievance Committee, Hon. Gabe Jacobson, chairman.

REPORT OF SPECIAL GRIEVANCE COMMITTEE

To the Honorable Geo. W. Currie, President, Mississippi State Bar Association:

In re: Disbarment proceedings against B. F. Bell:

As Chairman of the Special Grievance Committee in the matter of the disbarment proceedings against B. F. Bell, I hereby submit the following report:

Your Committee, after fully investigating the charges preferred against B. F. Bell for disbarment, unanimously decided that proceedings should be instituted, and employed the Honorable W. C. Sweat of Corinth, Mississippi, to represent the Mississippi State Bar Association in prosecuting the disbarment of the said B. F. Bell.

Disbarment proceedings were instituted in the Chancery Court of Oktibbeha County, Mississippi, the residence of the said B. F. Bell. The Honorable Charles S. Mitchell, Chancellor of said court, being disqualified, the Honorable T. P. Guyton, Chancellor of the Sixth Chancery Court District of Mississippi, was appointed to try the cause. When this cause was called for trial at the March, 1929, Term of the Chancery Court of Oktibbeha County, a continuance was asked by the said B. F. Bell on account of illness, and a continuance was granted by the Chancellor, and the cause reset for hearing on May 6, 1929.

I have all reason to believe that the cause will be tried at that time, and therefore the final report is deferred. Respectfully yours,

GABE JACOBSON,
Chairman, Special Grievance Committee.

HON. GEORGE BUTLER: I make a motion that that Committee report be received and the Committee continued.

(Which motion was duly seconded.)

PRESIDENT CURRIE: All those in favor of the motion will say AYE; opposed, NO. The motion is carried.

SECRETARY JIGGITTS: I have here a telegram from Bramlett Roberts, President Oxford Junior Chamber of Commerce, which is as follows:

Oxford, Miss., May 1, 1929.

The Mississippi Bar Association,
Clarksdale, Miss.

"The Oxford Junior Chamber of Commerce invites you to hold the next convention at Oxford and the State University. We will co-operate to make your stay here enjoyable and the meeting a success."

BRAMLETT ROBERTS, President,
Oxford Junior Chamber of Commerce.

SECRETARY JIGGITTS: I have a telegram here from Floyd W. Cunningham, which is as follows:

Booneville, Miss., May 1, 1929.

Hon. Geo. W. Currie,
President, Bar Association, Clarksdale, Miss.

"Father regrets unable to attend because suffering with abscess. Best wishes for good meeting."

FLOYD W. CUNNINGHAM.

JUDGE VENABLE: I have here a report of Special Grievance Committee, which is as follows:

REPORT OF SPECIAL GRIEVANCE COMMITTEE

To the Mississippi Bar Association:

Your Special Committee, appointed by the President, pursuant to a resolution of the Bar Association passed in its 1928 session, authorizing disbarment proceedings against Norman R. Allan of Shaw, Mississippi, beg leave to report as follows:

Disbarment proceedings were instituted against the said Norman R. Allan before Hon. W. A. Alcorn, Circuit Judge in the Circuit Court of Bolivar County, Mississippi, First Judicial District, and judgment of disbarment and revocation of license was entered on April 3, 1929.

W. W. VENABLE.
JOHN W. DULANEY.
J. C. ROBERTS.

HON. GEORGE BUTLER: I move that the report be received and filed.

(Which motion was duly seconded.)

PRESIDENT CURRIE: All those in favor of the motion will say AYE; those opposed, NO. The motion is carried.

SECRETARY JIGGITTS: I have here the report of the Memorial Committee, Hon. Ackland H. Jones, chairman, which is as follows:

Honorable Geo. W. Currie, President, Mississippi State Bar Association:

Your Committee appointed to present to the Supreme Court of the State the request and petition that the first day of the September term, in each year, be set apart as a Memorial Day for all members of the Bar of Mississippi who shall have died in the preceding year, would respectfully report:

As such Committee, we presented the petition to the Court and are gratified to announce that it was graciously allowed. The Court has, by rule, set apart and designated the first day of each September term as such Memorial Day, and this will be conducted hereafter under the direction of this Association.

We would also report that the first Memorial Day was held on the first day of the September, 1928, term, at which there was good attendance, and suitable resolutions were presented the Court in memory of all members of the Bar who had died in the preceding year.

Respectfully submitted,
ACKLAND H. JONES, Chairman.

HON. GEORGE BUTLER: I move the adoption of the report.

(Which motion was duly seconded.)

PRESIDENT CURRIE: All those favoring the motion will say AYE; those opposed, NO. The motion is carried and the report is adopted.

SECRETARY JIGGITTS: I have here a letter from Hon. R. E. Wilbourn, which is as follows:

Meridian, Miss., April 29, 1929.

Hon. George W. Currie, President,
State Bar Association,
Hattiesburg, Miss.

Dear Sir:

"I very deeply regret my inability to attend the meeting of the Mississippi State Bar Association at Clarksdale. Some matters have come up in the office that will not wait and that require the writer's attention, and render it impossible for me to attend.

"I want you to know that I regret this, and that I wish for you and all the members of the State Bar Association a most happy and successful gathering at Clarksdale.

"With kind personal regards and best wishes, I am,"

Your friend,
R. E. WILBOURN.

JUDGE KIMBROUGH: We are ready with the report of the Committee on Legal Education and Admission to the Bar. The hour is late, and as far as that is concerned, it is no use to report.

HON. H. A. SHOTTS: Mr. President, I move that the report be deferred until the next meeting and a committee of lawyers be appointed to confer about it, and possibly after conferring about the matter that they might want to amend it in some way. We know what it is. It always causes an upstir at these meetings, some of the lawyers get mad about it, and I think it would be better to defer it. I

move that it be deferred and a committee appointed to investigate it further and report at the next meeting.

JUDGE KIMBROUGH: There is no objection on the part of the Committee.

(The motion was duly seconded.)

PRESIDENT CURRIE: You have heard the motion that the report be received and consideration deferred until the next meeting. Any discussion? Those in favor of the motion will say AYE; those opposed, NO. The motion is carried.

SECRETARY JIGGITTS: I move we adjourn.

HON. H. A. SHOTTS: Second the motion.

Whereupon, the Association adjourned until Wednesday, May 2, 1929, at 9:00 o'clock.

SECOND DAY

The Association was called to order at nine o'clock A. M., on Thursday, May 2, 1929, by the President.

PRESIDENT CURRIE: When we recessed yesterday afternoon we were discussing the report of the Committee on "Judicial Administration and Remedial Procedure." A motion was made that it go over until this morning. No particular hour was set. We will take that up in a short while, after we hear some other reports, if they are ready, in which probably there will not be much delay. I am going to call the program in order, therefore, preceding the debate, unless there is objection. Are there other reports that are ready to be made now, for instance, the Committee on "Jurisprudence and Law Reform," Judge Stone Deavours, chairman? The Committee on "Professional Ethics?" Judge D. M. Russell.

JUDGE D. M. RUSSELL: Mr. President, and members of the Bar Association, Judge W. A. White, of Gulfport is chairman of the Committee on "Professional Ethics," the other members being, besides myself, Hon. J. P. Alexander, Hon. N. C. Hill, Hon. John D. Green, Jr., and Hon. William H. Maynard. Judge White is holding a term of court at Gulfport and he had hoped to be able to attend the Bar Association until last Friday when he discovered it would be impossible for him to attend. He regrets that very much, and I am sure that we all regret that he can not

be here. We are handing in a report which he prepared, and I will read it:

To the Mississippi State Bar Association.
Mr. President and Gentlemen:

Your Committee on Professional Ethics begs leave to report as follows:

No inquiries have been made of this Committee during the past year in reference to questions of professional ethics, and therefore we have no inquiries and answers to submit for your consideration.

In a report from this Committee at the 1928 meeting of this Association, which report was prepared by Judge R. H. Thompson, then Chairman of this Committee, it was suggested that the Code of Professional Ethics of the Mississippi Bar Association is largely the same as that of the American Bar Association. The Association was also advised that a Committee has been appointed by the American Bar Association to consider the adoption of certain supplements or amendments to the Code of Ethics of that Association.

Since that report the Committee referred to has reported to the American Bar Association 13 amendments or supplements to the Code of Professional Ethics, 12 of which were adopted and which appear on pages 770 to 781 of the report of the American Bar Association for 1928, said supplements being numbered from 33 to 45.

In view of the fact that some of them are practically covered by provisions now appearing in the Code of Professional Ethics of the Mississippi Bar Association and the statutes of the State of Mississippi and that some of them refer to conditions and practices that do not prevail to any extent, if at all, in Mississippi, your Committee does not recommend the adoption of any of them, except No. 34—that provision is in relation to division of fees, as follows:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility. But the established custom of sharing commissions at a commonly accepted rate, upon collection of commercial claims between forwarder and receiver, though one be a lawyer and the other not (being a compensation for valuable services rendered by each), is not condemned hereby."

In the 1928 report of this Committee the attention of the Bar Association was called to the fact that its Code of Professional Ethics had not been published for many years, and this Committee urged its publication, but it has not yet been republished. We now recommend that the Code of Professional Ethics be republished in a bound volume, and that the Code of Professional Ethics of the American Bar Association be published with it, as an additional guide to the professional conduct of lawyers, and that it be distributed to the members of the bar at cost.

We respectfully submit this report for your consideration.

W. A. WHITE,
D. M. RUSSELL,
N. C. HILL,
J. P. ALEXANDER,
JOHN D. GREEN, JR.,
Committee.

JUDGE RUSSELL: I might offer this observation with reference to the republication of our Code of Ethics. As this Committee cites by reference, our Committee at the last meeting of the Association recommended, and it not having been done at this time it is here recommended that we have a republication of the Code of Professional Ethics of this Association, including the American Bar Associa-

tion. I would like to submit to the Association that if they think favorable of that suggestion, that is to say, the publication in pamphlet form, or whatever form it may take, of the Code of Professional Ethics, that it would be a fine thing, I believe, if that could also carry the magnificent address of our President made on yesterday. I think it would make a very fine, very popular, and very helpful little pamphlet, if we could furnish all the members of the Bar and as many others as we had copies to provide, and I move the adoption of the report.

(Said motion was duly seconded.)

PRESIDENT CURRIE: Is there discussion?

HON. J. W. DULANEY: I would suggest not going to the expense of publishing it separately, but that we request its publication in the Journal. I offer that as an amendment.

(Said motion was duly seconded.)

JUDGE RUSSELL: I assume as a matter of course it will be published in our Law Journal, but unfortunately so many lawyers do not read that. I just made that suggestion to Judge White when he was preparing the report, that we should ask it be published in our Law Journal, and he made the response that he thought we should have it in separate form so that the lawyers could file it away. Of course, it would be carried to every member of the Association now in the publication of the Journal. I believe I am willing to accept the amendment.

PRESIDENT CURRIE: Is there further discussion? Those favoring the amendment will say AYE; opposed, NO. The amendment is carried.

The question now reverts to the report of the Committee as amended. Those that favor the adoption of the report as amended, will say AYE; those opposed, if any, NO. The motion is carried.

Are there further reports of committees? The Grievance Committee, Judge Lyell.

JUDGE G. GARLAND LYELL: Mr. President, and gentlemen, the Grievance Committee has a very short report.

REPORT OF GRIEVANCE COMMITTEE

To the Mississippi Bar Association:

Your Committee has handled approximately thirty complaints against members of the Mississippi bar. Something over twenty of these complaints have been adjusted to the satisfaction of the complaining parties and in such a way as to completely exonerate the attorneys involved from any charge of unprofessional conduct. In most cases the only criticism that

would lie is that the attorneys involved did not answer letters from their clients as promptly as same should have been answered.

Five recent complaints are pending, but it is believed that same will be cleared up to the satisfaction of the complaining parties and the lawyers involved. At this time the correspondence is not entirely closed and the files will be passed on to our successors.

Complaints against two attorneys, which complaints were passed on to this Committee by our predecessors, remain unexplained and unadjusted to the satisfaction of this Committee, and we think should be handled to conclusion by our successors. One unadjusted complaint charges a collection of money for a client for which no accounting has been made. And your Committee has been unable to get a reply to any communications addressed by its Chairman to the lawyers involved.

The files covering unadjusted complaints will be turned over to our successors.

The Committee realizes that under the rules of the Association that the unadjusted complaints can not be considered at this meeting of the Association. Based upon its experience in handling these complaints, and after having given the matter considerable thought, your Committee recommends that the constitution or by-laws of this Association be so amended as to not require the publication of the report of the Committee on Grievances.

We think a great injustice would be done in many cases, because some of the complaints we have found to be without foundation, and in all probability there will be such other complaints in the future. The explanation made by the attorney complained of and his exoneration by the committee and to the satisfaction of the complaining party, would never be given the publicity in any printed report, or otherwise, in such a way as to remove from the public and professional mind the thought that there might have been justification for such complaint. As in the case of rumor or gossip, the truth seldom, if ever, overtakes same so as to answer such rumor, and in many cases a lasting injustice would be done.

Respectfully submitted,

G. GARLAND LYELL, Chairman.
W. W. VENABLE.
HUGH V. WALL.

JUDGE LYELL: By way of explanation, as we know, the rules of the Association will not permit the consideration of our report or any action being taken on any of these unadjusted complaints, and as stated in our formal report, it is our judgment that the by-laws of the Association, Section 7, should be so amended as not to require the filing of a written report of the Grievance Committee with the Secretary, and, more particularly, that the report be not printed. Our thought is this, the mere filing of such a charge and its publication in any form means a pretty wide dissemination. Though many see it and read it, many others hear it. We do not feel that the most complete exoneration would save the attorney from considerable embarrassment in the future, whereas if the matter is submitted to the discretion of the Committee and let it make its recommendation without names being mentioned in the formal report—and we have mentioned no names here—that the purpose and aim of the Association in handling cases that

ought to be looked after by a committee could be effectuated and the interests of all parties protected.

Several of these claims that we have handled, and I will say there are about twenty or more, probably thirty—it makes quite a file—were utterly groundless so far as any unprofessional conduct is concerned, except perhaps some of the attorneys are subject to the criticism that they do not promptly answer correspondence. There is no moral turpitude involved, no misappropriation of moneys collected. Our most fruitful source of correspondence has been with some of these little collection agencies that want you to write a letter every time you turn around. There are some cases that should have attention, but we must pass them on to the other committee because our report was not filed with the Secretary thirty days before this meeting, and we have not done so for the reasons stated. If that report had been filed in express compliance with Section 7 of the By-laws, there would have been about twenty attorneys' names mentioned in the report or in the files attached to the report, and the complaints against those attorneys have been entirely cleared up to the satisfaction of the complaining parties, as well as, of course to this Committee. So we think a gross injustice would be done by filing any report thirty days in advance and reporting that there were unadjusted complaints, and greater publicity, of course, will be given to the fact that a charge has been preferred. Some of them have been utterly ridiculous, and for that reason, and just in this connection, that your attention may be fixed upon it, I have drafted an amendment that I am going to offer to Section 7 of the By-laws, and that is the section that has do with the appointment of committees and requiring their reports to be put in writing and filed with the Secretary thirty days before the annual meeting. It would read as follows, if the proposed amendment is adopted:

"Reports of Standing Committees, except the report of the Grievance Committee, shall be filed with the Secretary in writing not less than thirty days before the annual meeting of the Association."

JUDGE W. H. POWELL: As I understand, it is not necessary for the Grievance Committee to report the names of the persons complained of. I think this, that they can be held subject to the Committee, the names or the people who are investigated can be retained by the Committee. I agree with the report to the extent that the names ought not to be filed with the Secretary. I agree with it to the

extent that the names of those people complained of should not be published, but I think the report, without mentioning the names, the substance of the report, should be published, for the reason that it is an actual deterrent influence to any one of our members or any members of the Bar in Mississippi to keep them from being complained of by anybody. In other words, lawyers, as far as professional conduct is concerned, ought to be like Caesar's wife, above reproach, and I think if the lawyers of the State knew the Grievance Committee had these complaints, that they had investigated them, and that they were on the job looking after the complaint, it would make a man more careful in so conducting his business as not to warrant any complaint being made as to how he conducted his business, ethically or otherwise, and I disagree as far as any amendment to the report is concerned, I disagree with the report as read to that extent. I do not think we ought to suppress the substance of the report of the Grievance Committee from publication. I think the names ought to be left off, because, as the gentleman says, a great many unjust complaints are made. They can, if they see fit, destroy that record, only retain the report in substance, that these complainants have no case or that so many have been acted upon favorably, and so many have been acted upon unfavorably, but the lawyer who is acted upon unfavorably and the Committee has found that the complaint was not adjusted, his name ought to be published, not only with the Secretary here, but should be published in our Journal, in other words, if we are going to punish a man for being derelict in the performance of his duties as a lawyer.

JUDGE LYELL: What I had to say was somewhat afield to what would be before the Association at this time. It occurred to me that the requirement that it be filed thirty days beforehand would prevent any formal action by the Association; so I just move that the report of the Committee be received, and while I was on my feet I thought I would call attention to what the Committee thought would be a wise amendment.

(The motion was duly seconded.)

PRESIDENT CURRIE: It is moved and seconded that the report of the Grievance Committee be received and filed. Is there further discussion? Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

Are there other reports?

HON. D. W. HEIDELBERG: The report of the Committee on Obituaries and Memorials.

REPORT OF THE COMMITTEE ON OBITUARIES AND MEMORIALS

To Hon. George W. Currie, President of the Mississippi Bar Association:

Your Committee on Obituaries and Memorials begs leave to report:

That since the last meeting of this Association, death has been unusually busy at his accustomed work among the lawyers of Mississippi and of this Association. Since our last meeting eight members of the Association have died, viz.: E. B. Harrell of Canton, J. R. Rowzee of Newton, F. H. Lotterhos of Jackson, T. C. Catchings of Vicksburg, James S. Sexton of Hazlehurst, R. B. Campbell of Greenville, T. H. Somerville of Oxford, Bruce L. Newsom of Grenada, and Judge G. E. Wilson of Philadelphia.

Twenty-two lawyers, not members of this Association, have died since the last meeting, viz.: Henry Mounger of Columbia, C. G. Mayson of Hattiesburg, Wyatt Easterling and B. F. Cochran of Meridian, W. C. McLean of Grenada, S. L. Dodd and Jason Niles of Kosciusko, Judge Howery of Oxford, G. A. McLean of Winona, Carl Stingly of Gulfport, E. C. Watson, E. J. Bogen, Walton Shields and V. D. Boddie of Greenville, Guy J. Rencher of Columbus, T. E. Cooper of Jackson, W. S. Bates of Houston, W. A. Gullege of Jackson, T. G. Birchett of Vicksburg, Wm. T. Triblett of Carthage, James B. Sternberger of Magnolia, and James W. Mack of Marks.

We submit herewith obituaries of the deceased members of the Association, to be read before the Association and for publication in the Minutes.

D. W. HEIDELBERG,
C. V. HATHORN,
J. W. CUTRER,
W. C. SHIVERS,
J. F. TRULY,
Committee on Obituaries and Memorials.

HON. D. W. HEIDELBERG: I move the adoption of the report.

(The motion was duly seconded.)

MR. ————————: Mr. President, I would like to suggest an amendment to the report, to include the name of James W. McNamara, who died in September, and move the amendment of the report to the extent of including his name.

PRESIDENT CURRIE: Judge, do you accept the amendment, or shall we put it in the form of an amendment?

HON. D. W. HEIDELBERG: I ought to state, at the suggestion of the President, which I thought was a wise one, there ought to be some mention of the lawyers who have died who were not members of this Association. Therefore, I have a supplemental report in which we express our sympathy to the families of these deceased lawyers, who were not members of this Association. Shall I read it now? It is a supplemental report.

PRESIDENT CURRIE: Yes, sir, you may read it now.

WHEREAS, Since the last meeting of the Mississippi State Bar Association the following members of the legal profession who were not members of this Association have died, viz.: Henry Mounger of Columbia, Miss., C. G. Mayson of Hattiesburg, Miss., Wyatt Easterling and Judge B. F. Cochran of Meridian, Miss., Judge W. C. McLean of Grenada, Miss., S. L. Dodds and Judge Jason Niles of Kosciusko, Miss., Judge C. B. Howrey of Oxford, Miss., Judge G. A. McLean of Grenada, Miss., Carl Stingly of Gulfport, Miss., E. C. Watson, E. J. Bogan, Walton Shields and V. D. Boddie, all of Greenville, Miss., Guy J. Rencher of Columbus, Miss., Judge T. E. Cooper of Jackson, Miss., W. S. Bates of Houston, Miss., W. A. Gullege of Jackson, Miss., T. G. Birchett of Vicksburg, Miss., William T. Triblett of Carthage, Miss., and James B. Sternberger of Magnolia, Miss.; therefore be it

RESOLVED, That we deeply deplore the death of these members of the Mississippi Bar, some of whom were among the most distinguished lawyers of Mississippi, and we hereby express our sympathies to the families of these deceased lawyers and request the Secretary of this Association to mail to them a copy of this resolution.

D. W. HEIDELBERG,
J. W. CUTRER,
J. C. SHIVERS,
C. V. HATHORN,
J. F. TRULY,
Committee on Obituaries and Memorials.

HON. D. W. HEIDELBERG: I also move the adoption of this supplemental report.

HON. A. W. SHANDS: I second the motion.

PRESIDENT CURRIE: Is there discussion? It is moved and seconded that the original and supplemental reports of the Committee on Obituaries and Memorials be adopted. Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

HON. D. W. HEIDELBERG: Mr. President, the obituaries of deceased members of the Association, with two exceptions, have been prepared, and I fully expected those to be prepared. The obituary of Judge Lotterhos of Jackson was promised me by Mr. Will Watkins. I called his attention to it on my way here and he promised to mail it to me, but it has not reached here and I understand it has not been prepared. And also that of Judge Howrey of Oxford, Miss. I spoke to the Dean of the University Law School and he said he thought he would be able to get it written. Therefore, I move that the Secretary of the Association be requested to print these obituaries when they are written, in the minutes of the Association, and I have a promise that they will be written soon.

PRESIDENT CURRIE: Is there a second?

HON. GEORGE BUTLER: I second the motion.

PRESIDENT CURRIE: Is there discussion? It is moved and seconded that the memorials of the two gentlemen, Mr. Lotterhos, and Judge Howrey of Oxford, be printed in the minutes when received. Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

HON. GEORGE BUTLER: Mr. President, in justice to Mr. Will Watkins, I would like to make this statement. Mr. Watkins had collected the data and information requested to prepare the paper in regard to Mr. Lotterhos, but his time is being completely taken up by an investigating committee of the State Legislature, and he gave me that data and information and asked me to write it, if I could. I have not had an opportunity to do that, but it will be filed all right. Mr. Watkins was busy, is the reason why he could not do it.

PRESIDENT CURRIE: Gentlemen, if you will deliver them to the Secretary when written they will be printed in the minutes.

HON. D. W. HEIDELBERG: Gentlemen. I only see one member of this Committee present, outside of myself, and that is Mr. J. W. Cutrer. I do not know whether he made the announcement or not. I have had these obituaries written and asked certain members of this Association to read them. I am going to ask Judge Houston to come forward and read the life of Thomas Clendenning Catchings of Vicksburg.

JUDGE D. W. HOUSTON: This obituary is written by Hon. R. L. McLaurin of Vicksburg.

T. C. CATCHINGS

By R. L. McLaurin

Thomas Clendenning Catchings, born on the 11th day of January, 1847, on the plantation of his father, near Bolton, in Hinds County, Mississippi, after a long and useful career, departed this life on the 24th day of December, 1927.

That he was always a polished gentleman could not well have been otherwise, for he was the only son of a gentle parentage, cultured and refined to the last degree.

Born and reared in affluence, his early opportunities were exceptionally good and he took exceptional advantage of them until the outbreak of the War Between the States, when his course at Oakland College was cut short.

Although a mere lad, at the first call to arms he entered the service of the Confederacy.

He was in the first battle of Mannassas, and remained in active service until his command was disbanded in Alabama after the capture of President Davis.

The war over, he studied law in the office of Harper and Shelby in Brandon, Miss., and after admission to the bar, practiced his profession in Vicksburg with distinguished ability until he was elected and became Attor-

ney General of Mississippi in January, 1878. He served as Attorney General until 1885, when he resigned. He was elected and served for sixteen years continuously as Congressman from the old Shoe String District. When he voluntarily retired he was at the head of the Ways and Means Committee and floor leader on the Democratic side.

Retiring from Congress he returned to Vicksburg and continued to practice law with ever increasing ability and reputation until death relieved him of his labors.

His faithful wife preceded him to the grave about one month. Thereafter he did not appear to take much interest in this earthly existence. His life had already been long extended beyond three score and ten. He passed away possessing all of his faculties, rich in honors and glorious with praise, surrounded by loved ones, his neighbors and his friends.

Nature sets indelible marks upon the productions of which she is proudest. His outward form proclaimed the man. His compact, firm knit frame, his heavy shoulders, his round head, his striking face, bearing the furrows of many fierce battles, in war, in politics and at the bar, but from which there still shone his gentle kindly nature, all indicated his purpose, a man easy to approach but dangerous in conflict.

As a soldier (always a private) he is said to have been obedient to his officers and kindly and considerate of his companions in the ranks. He was without fear.

As a statesman he had broad views and compassed the interests of his whole country. Learned in constitutional law, in history, ancient and modern, a classical scholar, he was prepared at any time to take an intelligent stand in current affairs and to contend for the best interests of his country.

He was an able lawyer, well equipped and well prepared on a given occasion. Above all he was a patriot and a Christian gentleman. To him the arrogance of intellect was offensive, but the arrogance of ignorance was intolerable.

If I were called upon to suggest an epitaph I would say, in the language of the poet:

> "An honest man here lies at rest
> As e'er God with His image blest;
> The friend of man, the friend of truth;
> The friend of age, and guide of youth;
> Few hearts like his with virtue warm'd;
> Few heads with knowledge so inform'd;
> If there is another world he lives in bliss,
> If there is none, he made the best of this."

HON. D. W. HEIDELBERG: I will ask Mr. Leftwich to read the obituary of Hon. E. B. Harrell.

HON. GEO. LEFTWICH: Mr. Chairman, I will read the obituary on the life of Hon. E. B. Harrell. I am delighted to perform this office. I had the honor of serving in the Senate with Mr. Harrell and he was a most genial and attractive gentleman. *

HON. D. W. HEIDELBERG: I will ask Judge D. M. Russell to come around and read the life of Hon. James Robert Rowzee, a member of this Association, which I am sure will be interesting.

JUDGE D. M. RUSSELL: I will read the obituary of Hon. James Robert Rowzee of Newton, Miss.

* See Mississippi Law Journal, Vol. I, No. 4, page 358.

JAMES ROBERT ROWZEE

By Stanley Majure

James Robert Rowzee was born July 17, 1882, in Newton County, Mississippi. He was the son of R. W. Rowzee and Ann Rowzee, long residents of Newton County.

James Robert Rowzee received his education in the schools of the county, and later studied law at Millsaps College, in the city of Jackson, Miss. He was admitted to the Mississippi State Bar immediately thereafter, and began the practice of law in Newton, Miss., where he was engaged in a lucrative practice up to the date of his death, January 26, 1929.

James Robert Rowzee enjoyed the confidence of his fellow townsmen, having been elected to the office of Mayor of the town, where he served for some years, bringing into that office ability, a wide experience, and an earnest desire to perform with distinction the duties incumbent upon that office. He was also greatly favored in the Masonic bodies of the state, having held many of the high offices in the various branches thereof, where he will be greatly missed for many years to come.

On December 24, 1914, he was united in marriage to Miss Gertrude Norris, daughter of the late Dr. Norris and Mrs. W. S. Norris of Newton County, Mississippi, a woman of high culture and intellectual attainment, who survives him, together with their infant daughter, Roberta Rowzee, aged eight years.

James Robert Rowzee was a Democrat, and always took an active part in the political affairs of the state. His public service was a distinguished one. He was earnest, honest, industrious, courageous, always standing for the right in every cause.

In his passing the state has lost one of its good citizens, the bar, a highly respected lawyer and brother, and one who will be missed in the court rooms, at the annual meetings of the State Bar, and in social contact everywhere.

HON. D. W. HEIDELBERG: I will request Mr. W. S. Welch to read the life of Judge George Eugene Wilson.

HON. W. S. WELCH: I will read the resolutions adopted by the Neshoba County Bar Association on the death of Judge Wilson.

To the Honorable Earl Richardson, President, Neshoba County Bar Association:

We, the undersigned Committee, appointed to draft resolutions touching the death of our brother lawyer, Honorable George Eugene Wilson, respectfully submit the following:

George Eugene Wilson, the son of James Cook Wilson and Mary Elizabeth Davis, was born July 6, 1869, in the town of Philadelphia, Miss. He attended Springfield College at Daleville, Miss., during his youth, and later studied law at Cumberland University, Lebanon, Tenn. After being admitted to the bar and practicing alone for a number of years, he, in 1905, formed a partnership with A. M. Byrd, who later served with great distinction in the Congress of the Nation. In 1896 he was elected to the Mississippi Legislature, and later served as Senator from the 17th District of Mississippi in the Mississippi Senate. At a still later period he served his county as a Representative in the Lower House of the Mississippi Legislature. At a period between 1903 and 1912 he was private secretary for A. M. Byrd, and the affection and confidence exchanged between these men was a source of great benefit and honor to them both.

George Eugene Wilson came from that sturdy stock which characterized the Mississippian in the days of the Old South, when courage, honor, and truth were the attributes which most challenged the admiration of men.

As a legislator, Judge Wilson ranked high in both houses of the Mississippi Legislature. He possessed the ability to accurately weigh the dangers as well as the virtues to be found in all measures before the lawmaking body of his state. He was never known to cast a vote for a measure until he was

fully advised as to the merits of that measure. In debate, bold and fearless he was when raising his voice in the cause of the people, and yet fair and open-minded at all times and willing to accept whatever virtues might be found in the position of those who opposed him. He had few equals and no superiors in championing a cause which, in his judgment, touched the welfare of the people.

Judge Wilson possessed an unusually brilliant mind. His was the God-given power to look into the many paths which lead the fickle from the ways of truth and find and follow that one where truth and right abide. As an advocate, Judge Wilson served his clients and his country with distinction to himself and benefits to his clients when opposed by the best minds and talents of the state. Judge Wilson for many years was recognized as one of the strongest lawyers of his state, and his services were sought by those who needed talent and ability of the highest order.

The same unusual ability which he had displayed as a member of the Legislature and as a lawyer marked his career as Circuit Judge. To the bench he brought learning in the law to a marked degree, and displayed that peculiar temperament so much needed upon the bench. Patient and courteous at all times to counsel and litigants, and yet dignified and reserved as so much becomes those who adorn the bench.

No eloquence of counsel, no deception upon the part of those whose course was unholy ever served to either deceive or influence Judge Wilson. He was truly a lover of truth, and to have truth triumphant in his court, and to have the rules of law predominate in establishing that truth, was the ambition of his life.

The tyrant had no place before him, however armed he might be with political, financial, and social position; but the humble of earth whose cause was just was the equal of any man in his court.

If there was one characteristic of the man which towered above another, it was the high sense of honor and high conception of duty which was his. No man questioned the official integrity of Judge Wilson; such thoughts never entered the minds of men, because his every official action gave warning to him who might presume to think otherwise.

Judge Wilson was not only a valuable public servant, a skilled and learned lawyer, a profound and brilliant judge, but he was a friend indeed to those who had fallen into those paths where men lose confidence in their fellow men.

Judge Wilson was capable of being a friend. He was fair and unyielding in matters touching duty; he was as tender as a child when dealing with those whom he loved. His friendships were many, and those who loved him can be found in every walk of life.

The greatness of the man was largely displayed in the latter days, when affliction had laid its heavy hand upon him. Believing firmly in the justice of his God, he bore his many burdens with courage and fortitude, and no man ever knew him to complain of them.

Judge Wilson was a loving father, a devoted and loyal husband, and a man who found within the bounds of his own home all the romance and gold and glory that was needed to make life sweet and beautiful. Therefore be it

RESOLVED, That in the death of George Eugene Wilson, this bar and this state has lost a brilliant lawyer, a learned, dignified and upright judge; and the County of Neshoba has lost a distinguished citizen, and the family and friends of Judge Wilson have lost one whose place cannot be filled, and whose loss will be heavily felt throughout the days to come. Be it further

RESOLVED, That a copy of these resolutions be spread upon the Minutes of this Court and a copy be furnished the family of Judge Wilson, and also that a copy each be furnished to the Neshoba Democrat and to the State Bar Association.

Respectfully submitted,

PAUL DEES,
MARION W. REILY,
W. W. PIERCE,
J. B. HILLMAN,
Committee.

HON. D. W. HEIDELBERG: Mr. President, I understand that Mr. Venable is on his way here. His part of the program was to have been taken up yesterday evening, and he was expected to read the lives of these two distinguished gentlemen, an obituary of one of the most distinguished members of this Association, Mr. J. S. Sexton, who was one of the presidents of this Association, and probably the most active members of this Association, known probably to every lawyer in Mississippi; and another prominent lawyer of Greenville, Judge Campbell, known to all of you, and also one of the presidents of this Association. I think it would be wise to proceed with the other business of the Association, and as soon as Mr. Venable arrives we will have these obituaries.

PRESIDENT CURRIE: If you will call attention when he comes in, we will revert to that.

I will next call on Judge J. Morgan Stevens of the Code Commission.

MR. TRAVIS: My attention is called to the fact that the time has arrived for the address of our distinguished visitor, and if that is true, I think it would be in order to suspend other business until we hear that address.

PRESIDENT CURRIE: Eleven o'clock is the understanding, is it not?

JUDGE D. W. HOUSTON: Our orator desires that you proceed with the regular business.

PRESIDENT CURRIE: Gentlemen, I have the pleasure of presenting to you Judge J. Morgan Stevens, chairman of the Mississippi Code Commission, who has kindly consented to give us a report of that Commission.

JUDGE J. MORGAN STEVENS: Mr. President, ladies and gentlemen of the Bar:

For brevity I have written a short paper in the nature of some observations touching the work of the present Code Commission, and with your permission I will just read this paper:

Some Observations of J. Morgan Stevens, Chairman of the Code Commission, Touching the Organization and Present Work of the Commission.

The Legislature at its regular 1928 session, by Chapter 193, passed an Act approved April 26th, 1928, authorizing and directing the Governor "to appoint three suitable persons, one from each Supreme Court District, learned in the law as commissioners whose duty it shall be to **revise, arrange and classify** all the statute laws of this State of a general nature into one code, in-

cluding all such laws of a general nature as are now in force, and that may be passed at the present session of the Legislature, and index the same.'' By the express terms and provisions of the Act the Code is to be in two volumes, volume one to contain such laws of a criminal and civil nature as are most frequently used at the bar, while volume two is to contain all laws not embraced in volume one. The statute in question follows closely the revision act under which the Code of 1906 was prepared. It required the Commission to meet and begin the task assigned within thirty days after their appointment.

In compliance with the statute the Governor appointed, as the Bar well knows, Honorable Chas. Lee Crum from the Northern District, Honorable V. A. Griffith from the Southern District, and the writer of this paper from the Middle District. The Commissioners met in the city of Jackson within the required time and organized by the election of the writer hereof as Chairman: Mr. R. T. Mobley, a graduate of the University of Mississippi Law School, as Clerk, and Mrs. Sue Stockett Miller as stenographer.

The last official codification under legislative sanction is the Code of 1906, adopted twenty-three years ago, although the efficient two volume compilation of 1917 by Honorable William Hemingway, at present one of the law professors at the State University, received legislative approval and has ever since been accepted and cited by Bench and Bar as an official code. But the need for an official revision appeared obvious and urgent. It is a matter of common knowledge that for many years there has been a growing disposition to make all law statutory. Every session of the Legislature witnesses the enactment of new laws and many amendments to existing statutes. The Legislature has not always been careful to designate what is repealed and what is continued in force. Courts have constantly been called upon to consider alleged repeals by implication. The oft repeated language in the repealing clause of a statute ''that all laws and parts of laws in conflict with this act are hereby repealed,'' without specifying the acts or parts of acts which the Legislature considers in conflict with the new statute, has constantly placed a delicate duty not only upon the legal adviser but upon the courts to search out and determine exactly what laws are in conflict with the given act. The evil tendencies of such a practice with the resulting confusion were aptly picture by the late lamented F. H. Lotterhos in a splendid paper read before this Association several years ago at Biloxi. But, while the Bar of the State seems to have appreciated the need for a revision, it remained for a sensible farmer and business man to sponsor and become the author of the present act authorizing a recodification of our laws.

One of the first problems that confronted the present Commission was to determine its duties and functions. There is

manifestly a wide distinction between a revision and a compilation. If we adopt the interpretation which prior commissions have given to the word "revise" there is no doubt of our authority to prepare and present to the Legislature such changes in our statutory laws as to the Commission may seem necessary or proper. But the exercise of such power to revise is one of our most delicate and difficult functions. As forcefully suggested by Mr. Hutchinson in the preface to his compilation, "It is for the People, by their Senators and Representatives, admonished and restrained as they are by a plain and permanent written Constitution, to enact, change, or abrogate Statutes, as experience may prompt;" and while he said some very disparaging things in reference to a revision, yet he seems to express the need for a periodic revision when he further said, "Legislation is often obscured, conflictive, in repetition, amendatory, enlarging, or restraining, and often solemn adjudications are sought to settle what are the governing statutory rules." We thoroughly agree with the learned compiler in stating that the power to enact laws is vested exclusively in the Legislature; and any revision commission in the discharge of its duties must ever be sensible of this fact.

It may be of some interest in this connection to remind the Bar that the first digest of our laws under territorial government was prepared by Mr. Harry Toulmin, who, according to Mr. Claiborne, was a learned member of the Bar, of English descent, living in Washington county, Alabama. His work was adopted in 1807. Eight years afterward one Edward Turner of Natchez was authorized to compile the statutes in force up to 1816. After the adoption of the Constitution of 1817 and the admission of Mississippi into the Federal Union, the Legislature in 1821 passed an act to "revise and consolidate the statutes of the State with amendments and additional bills and to report them to the Legislature for their concurrence and approval." Honorable George Poindexter, Governor of the State, was requested to undertake the work resulting in what is commonly known as the Poindexter Code, modeled, as it is said, after the Code of Virginia. History records that the making of a new code is not always a popular job. We are told that the Poindexter Code was met with violent opposition and made its author an unpopular candidate in his race for Congress; although the Code was adopted in 1822 by the Legislature sitting at Columbia, Mississippi.

When a constitutional convention, assembled in Jackson, Mississippi, adopted the Constitution of 1832 and thereby made radical changes in our organic law, another revision of our statutes was made necessary. Accordingly General P. Utilius R. Pray, a native of Maine and a resident lawyer at Pearlington, Hancock county, was authorized in 1833 to prepare it. It is said that Mr. Pray was influenced by his proximity to Louisiana,

where the French or Roman law prevailed, and that he had a distinct leaning toward the Roman law. Largely for that reason his work was not satisfactory to the Bar, resulting in the selection of Howard and Hutchinson to prepare another Code. Mr. Howard was the Official Court Reporter for the Supreme Court and another of several distinguished men who migrated to Mississippi from Maine. Undoubtedly Howard and Hutchinson were each learned lawyers, but their first effort was not crowned with full success. On that account it seems that Mr. Hutchinson of his own motion began the task of compiling a new code, which he denominated an "analytical compilation of the public and general statutes of the Territory and State with tabular references to the local and private acts from 1798 to 1848." When his work was submitted to the Legislature a resolution was passed authorizing the Governor to appoint a Commission to examine it and upon a favorable report of this Commission the Code was adopted. The Commission reported that it was "a full and complete compilation of the statute laws of the State." While it was freely used by Bench and Bar as an official code, nevertheless in ten years after its adoption three eminent judges, to-wit, Sharkey, Ellett and W. H. Harris, gave us what is commonly known as the Code of 1857. The practitioner of today is thoroughly familiar with the official Codes of 1871, 1880, 1892 and 1906, coming rather periodically and with authority.

While our Commission met and organized May 17th and put our clerical force to work as of June 1st, we were severely handicapped on account of the failure of the Legislature to make the necessary appropriation to do the work. It so happened that the revision act was approved by the Governor on the closing day of the legislative session, and therefore the companion appropriation act could not be considered until the extraordinary session, which convened October 1st. An appropriation for the work was approved by the Governor November 13th. While the Legislature required us to begin the task assigned within thirty days after appointment, the Commissioners and their clerical force had no equipment except such as they could beg, borrow or buy on credit. And right here it is eminently proper to give public recognition of our appreciation to this Association and especially to the Committee appointed by this Association to collaborate with and co-operate with us in the all important work in hand. In our dilemma we turned to Mr. Brunini, Chairman of the State Bar Committee, for his counsel and friendly suggestions. This Committee composed of Messrs. Brunini, Fant, Thomas, Ford and Harmon, cheerfully came to our rescue and together with the industrious and efficient President of the Association took upon themselves the burden and responsibility of urging upon the Legislature the necessity for an appropriation. In doing so, considerable correspondence was conducted by the Committee and by the President of this Association with upstand-

ing members of the Legislature. The response from members of the Legislature, both lawyer and layman, was cordial and sympathetic. Just as the laborer must have his tools, so the Commission was absolutely compelled to have an abundant supply of stationery, carbon, typewriters and other equipment before making very much progress with our work. And while we were considerably delayed by the lack of an appropriation and other circumstances over which the Commission had no control we are happy to report at this time the work is well in hand and barring unforeseen obstacles will be completed on schedule time.

Feeling that our work should be largely for and acceptable to the Bar we have conducted considerable correspondence with leading lawyers over the State, submitting to them a questionnaire on many important subjects. As soon as the Commission had been organized many practitioners suggested their preference for a one volume code. Some even suggested that the Legislature should be asked to amend the revision act so as to authorize the Commission in their discretion to determine the number of volumes. We saw at once that the question as to a one volume code turned upon the related question as to whether the Bar demanded full and complete annotations. In the questionnaire submitted to leading practitioners their views were sought upon these questions, among others. The result of the questionnaire disclosed that while there was conflicting opinions as to a one volume code, no fewer than seventy-five per cent of the attorneys interviewed voted in favor of copious annotations. It was at once manifest that if full and complete annotations are given the work could not be embraced within the compass of one volume. It has been suggested, however, that in addition to the two volumes fully annotated the Legislature might well authorize a compact one volume edition of statutes only, without annotations; and the advisability of such recommendation to the Legislature is being seriously considered and therefore its importance is respectfully suggested to this Association.

We were happy to find the sympathetic attitude of all the judges as well as the lawyers over the State and many helpful suggestions have come to us from members of the judiciary.

The Commission feels that the all important subject of changes in our laws or the general task of a revision is the most important part of our duty. The work of compiling existing statutes would be more or less mechanical. A revision on the contrary calls for thoughtful study and exceeding caution. The political equation can not be ignored. While the Commission has the authority to revise, we feel that fundamental changes should be left to the initiative of the law making body. It is more our duty to take the existing frame work and rebuild, if necessary. Many chapters of our general laws have heretofore been carefully revised and need little, if any, change.

We have felt it exceedingly appropriate to consult the various heads of governmental departments about any changes pertaining to their special subjects and have called upon them to submit to us in writing suggested changes, based upon their experience and observation. We have thus far had from them cheerful response.

At the time this report to the Bar is dictated there is scheduled to be held at Clarksdale, a joint meeting of the Code Commission and the Committee appointed by the President of this Association to co-operate with us in our work. The purpose of this meeting is to give representatives of this Association full opportunity to make helpful suggestions as to any needed revisions, the mechanical work of printing and binding and any other features. We wish the Bar to understand that we welcome their suggestions and indeed that we shall expect to receive their continued co-operation.

JUDGE J. MORGAN STEVENS: Gentlemen, I thank you, and, Mr. President, if you have the time I am going to take the liberty of suggesting that Judge Griffith, a member of this Commission and an outstanding member of the Supreme Court, is present, and if he would, I would be glad for him to supplement this report.

PRESIDENT CURRIE: We would be glad to hear from Judge Griffith. Gentlemen, I present Judge Griffith, a member of the Supreme Court and of the Code Commission.

JUSTICE V. A. GRIFFITH: Mr. President, and members of the Bar Association:

Judge Stevens, has, of course, referred to the most important thing we have before the Commission. That is the question of revision. To what extent shall we undertake to revise? I apprehend that the main reason for the creation of this Commission was the confused condition of four chapters in our present laws, the chapter on Drainage Districts, the failure of the attempt to properly revise the chapter on Schools, which was attempted by the school men some four or five years ago, the confused condition of our road statutes, and the antiquated condition of our general chapters on Revenue. I think without those there probably would not have been any call for revision at this time. The Bar would have been able to have gotten along with compilations that have been gotten out by a distinguished member of this Association.

But just how far we could go without raising political questions, as has been adverted to, we do not know. This will have to be proceeded with carefully. We have deter-

mined to work together on this. As soon as the Supreme Court shall adjourn we are determined to have joint meetings and work together, have an office, and may do that work together.

Now, as to Volume I, that is, I am speaking now of arrangement, I mean Hemingway's Code, that material in that volume has been worked over by distinguished lawyers, the most distinguished men in Mississippi, and I think if we should call a few of the names of those men you will find perhaps that they rank well with lawyers anywhere in this nation. So that we have enough material in that volume, not perfected laws, for there is no such thing, but laws, a system of laws and procedure, those things most often used in the courts, a series of statutes that are as near perfected to fit our own conditions here as we can well hope to get. If you will compare that material in Volume I with statutes and codes of other states, I think it will be gratifying to any lawyer in Mississippi, not indulging in too much partiality to our own system, to compare it with what they have in other commonwealths and what some of the states have in their codes. We have enough there to make us proud of our own system in Mississippi. We still preserve all the essentials of the common law, those things which are found to be best suited to our conditions. We have lopped off the dead branches. We have preserved the strong trunk of the tree, and we have it simplified so that every man can understand it and can use it, and there is very little to be done to it. So if you could take Volume I of the present compilation and leave it just as it is, we would still be in a very fortunate condition; I say much more fortunate than the average state of this Union that has attempted here and there and everywhere to codify everything. So we are going to lay very sparing hands upon what is in Volume I.

I did suggest yesterday one change that you might consider as going some distance, and probably there are some few other changes, which is that paragraph that deals with admissibility of evidence. But it is in Volume II where the work will be required, and that is where we ought to have suggestions, suggestions from the Bar. I have been interested in seeing these members of the Bar sit down and talk for an hour about needed changes, and when I suggest to them that they put that in shape so that the Commission can use it when they get to that, they hesitate and will not do that. I cannot understand why that should be. Every

lawyer seems to have fine ideas of what to do, and yet they won't rise.

Now, let me, in addition to Judge Stevens' suggestion, make that as not only a suggestion, but a special request to every member of this Bar, when you return home and get to thinking over this, suppose you take the present compilation, go through it, note what you would like to see changed or considered, and write out that under logical headings and send it to the chairman of the Commission at Jackson so that we can then index it and put it all together and consider it when we get to taking up these chapters down there and going over them one by one.

I have found—take the matter in Volume I, some of those chapters are supposed to be confusing today. What is really needed is a mere re-arrangement. You may take the chapter on Executors and Administrators, and if you will read that chapter through you will be impressed somewhat with the idea that we have a fine system of probate procedure in Mississippi. As a matter of fact, we have, as we regard it, one of the simplest systems of probate procedure in this state of any state in this Union. It is fitted absolutely to our habits of life, our ways of living. It is simple, yet the trouble has been that there is a fault in the logical arrangement of that chapter. It is not logically arranged. You will read two sections on one subject, and there will be a third section following that on an entirely different thing, and then will follow the fourth section going back to the original subject. There is no logical arrangement, and that has come about by the fact that it started away back under our old probate system under the Constitution of 1832, and when a new statute would be enacted it would usually be put at the bottom in any subsequent revisions, so that the logical order has been lost in a great many of these chapters.

Now, the way we are doing this work, we would get a copy—take the last compilation and cut out every section in the code, and pin them on a large sheet of paper and you can move them around and re-arrange these sections until finally you get an arrangement of those sections into logical order. That is the only way you can get a full view of it. That has been done in a great many of our chapters and most of them will be done that way in re-arranging the logical order of the chapters, that is, where there is nothing to be done with the sections except re-arrangement. But

when we go to the revising, that is where we need the aid of the members of the Bar.

Now, it is our ambition to make a great improvement on anything that has ever been attempted as a code in Mississippi. We are attempting to get out this work in a careful way in a style that will equal that of the most modern codes anywhere in the country, and at the present time we are considering the form and contents of a recent and complete compilation of the code of Texas. That is in three volumes, but, of course, we are confined to two volumes. We are glad to have suggestions along that line.

I think, Mr. President, these few rambling suggestions are all I can think of right now. I urge again that every member of this Bar Association write out in a logical way, giving his reasons for it, and what it is he thinks ought to be revised anywhere, in either Volume I or Volume II, and send them to the chairman of the Commission. They will all be indexed, all the subjects put together, and that will be of the greatest help. I might give you an illustration. The chapter on County Courts was assigned to me. We sent a questionnaire to every one of the county court judges. We had some very splendid replies. Those were indexed, each feature put to itself, and of those suggestions, every suggestion practically that has been made by a county court judge has been adopted in the revision of that chapter. That can be done on all the others.

I thank you, Mr. President, for this opportunity of presenting this matter to you. (Applause.)

PRESIDENT CURRIE: I am sure the Bar Association is greatly indebted to and appreciates the report made by our Code Commissioners. I commend that spirit and that work to you lawyers, and I certainly hope you will make use of the suggestions that these gentlemen have made.

We will now have the report of the Code Committee, Mr. Brunini.

HON. JOHN BRUNINI: Mr. President, your Committee on the Code simply reports we have endeavored to be of assistance to the Code Commissioners. We want to join the Commissioners in asking the members to heed their requests to send in your suggestions and advice as to what should be revised in the code. The people of Mississippi are expecting a monumental work at the hands of the Code Commission. We are all vitally interested in the building of the best Code that Mississippi has ever had. We have

got, most of us, to work under that code for the remaining span of our lives, and there is only one thing that we wish to express, and that is the importance of the members of the Bar in aiding the Code Commissioners in every way possible. (Applause.)

PRESIDENT CURRIE: Judge Heidelberg, are you ready to continue with your reports?

HON. D. W. HEIDELBERG: The hour for the address has arrived, and I would suggest that we take them up the first thing after dinner.

PRESIDENT CURRIE: We have no afternoon session, unless the house so votes. The session of this morning concludes the program.

HON. D. W. HEIDELBERG: It has been suggested that as we have no time to read them, three of them are among our most prominent members, that they be simply printed in the Journal and not read. I make that as a motion.

SECRETARY JIGGITTS: I second the motion.

PRESIDENT CURRIE: It has been moved and seconded that the three memorials, instead of being read, be printed in the minutes in the Mississippi Law Journal. Those favoring the motion will say AYE; those opposed, NO. The motion is carried. *

RESOLUTIONS

Resolutions adopted at a meeting of the Bar Association of Mississippi, held at the City of Clarksdale, Miss., upon the death of Honorable R. B. Campbell:

WHEREAS, The bar of Mississippi has suffered the loss of its Ex-President and feels that the passing to his final reward of such a man demands from the bar some expression of its appreciation of him and his services; and

WHEREAS, We have known as fellow lawyer and friend the Honorable R. B. Campbell for many years, have observed with respect and admiration his life, his daily conduct, and observed his standing and influence in his community; and

WHEREAS, We realize that as a lawyer he was studious, devoted to the interests of his clients, learned in the law, unvaryingly logical, and yet withal an opponent whose fairness never failed and whose courtesy was always to be relied upon; whose attainments as a lawyer caused him to be selected by us as President of the State Bar Association; and

WHEREAS, His learning and standing as a lawyer were of statewide renown and an example for the emulation of his fellow members of the bar; and

WHEREAS, In his private life he was a devoted and faithful husband and father, finding in his home and family his joy and relaxation, giving to them unstintingly of love and care and attention; and

* See Mississippi Law Journal, Volume I, No. 4, page 353, for memorial of Hon. J. S. Sexton.

WHEREAS, As a citizen his position was always for the upbuilding and the moral development of his community, a mainstay of the Baptist Church, he having been a founder of the church in Greenville; and

WHEREAS, For years his scholarly knowledge of the Bible was given to the Men's Bible Class of his church, which he served with joyful faithfulness; and

WHEREAS, He rendered to the State of Mississippi, as a State Senator and as a member of the Constitutional Convention and compiler of the code, a great service as lawmaker and statesman; therefore be it

RESOLVED, That we, the members of the bar of Mississippi, deeply deplore the loss of friend, counselor and exemplar; that we extend to his bereaved family our sincere sympathy and ask for them the healing care of the Deity in whom he so firmly believed.

RESOLVED FURTHER, That we extend to the City of Greenville, and County of Washington, and State of Mississippi, our sincere sympathy in their loss of an eminent and useful citizen.

RESOLVED FURTHER, That a copy of these resolutions be furnished the family, be sent to the Greenville Democrat Times, Jackson News, Clarion Ledger and Memphis Commercial Appeal and Press-Scimitar, and be spread upon the Minutes of this Association.

A TRIBUTE TO JUDGE BRUCE DAVENPORT NEWSOM

Judge Bruce Davenport Newsom was born in Tate County on the 25th day of June, 1893, the son of the late Dr. E. C. and Mrs. L. J. Newsom. After graduating from the Law Department of the University of Mississippi in 1917, he located at Grenada and soon attained prominence and success as a practitioner at the bar. In December of 1926 he was appointed by Governor Murphree judge of the Fifth Judicial Circuit District, succeeding the late Judge T. L. Lamb, and as such he met the expectation of his many friends.

Judge Newsom was splendidly endowed with some of the most cherished traits of human character, in that he was possessed of wonderful industry, untiring energy, and of determined purpose, a generous, genial, and sympathetic nature. There was little dissimulation about him, and he was loyal to his friends and clients.

On the 17th day of June, 1928, the earthly career of Bruce D. Newsom came to an end. He was called away in the springtime of his life and at the very dawn of what promised to be an active and successful life. There are, of course, thousands of things about life and the whyness and wherefores connected therewith that the wisest of men have never been able to understand or explain. Yet we realize, as we peep into the fogs and clouds of futurity, that an all-wise and divine Jurist entered this last decree against our departed brother, and we bow in humble and respectful submission thereto.

In writing this necessarily brief tribute to Judge Newsom, the Grenada bar wishes to express its sincere sympathy to the widowed wife, the two little daughters, the mother and other members of his family; and conclude by requesting that this memorial be made a part of the permanent records of the Mississippi Bar Association.

THOMAS HUGH SOMERVILLE

(Read before the Supreme Court on Memorial Day, 1928)

Thomas Hugh Somerville passed from this life to his eternal reward on June 11, 1928. He died in Oxford, the town that was his home for the last 32 years of his life. Though he had been in steadily declining health for two years, he maintained his law office and his interest in the profession to which he was devoted until within a few months of his death. His long-established clients were unwilling to relinquish his services; and his love for work and for service kept him active beyond his strength after he had well earned the right to rest and retirement.

Dr. Somerville was widely known. A generation of lawyers, prominent in every court of the state and widely distributed in other states, sat under his tutelage while he was a professor of law and, later, dean of the Law School in the University of Mississippi. He was for years active in the councils and on programs at the meetings of the Mississippi State Bar Association. In 1909 he was president of this Association. He was a member of the Legislature in 1880-82, representing the County of Carroll; and he was again a member, this time of the upper chamber, in 1896, when he resigned to accept appointment as a member of the law faculty in the University. Prior to this appointment he had practiced in the federal and state courts. When he began the practice of law in 1872 he was a junior partner of the late Hon. James Somerville, his cousin, of Carrollton. Subsequently he formed a partnership with the late Hon. Monroe McClurg. When this partnership was dissolved, upon the election of Mr. McClurg as state Attorney General, he formed a partnership with the late Judge George McLean of Winona. During this period of his life, from 1872 to 1897, he lived successively at Vaiden, Carrollton, and Winona.

Though practically all of his active life and service were spent and rendered in Mississippi, Dr. Somerville was a native of Virginia. He was born at Somervilla, the family home, in Culpepper county, a Scotchman by birth, education, and rearing. His parents were Samuel Wilson and Jennie Farish Somerville, to whom were born six sons and four daughters. Thomas Hugh Somerville was married on June 4, 1878, to Miss Ella Vasser, only child of the late Dr. G. W. and Eliza Roseborough Vasser. Six children were born to this marriage, all of whom are living save one, Ellen Douglas, the second child, who died when five years old. The living are: Hugh Vasser, a prominent citizen of Paris, Tenn.; Therese, now Mrs. Relbue Price, of Jonesboro, Ark.; Mary Hartwell, now Mrs. David H. Bishop, of University, Miss.; Ella, of Oxford, Miss.; and Nena, now Mrs. J. C. Culley, of Oxford, Miss.

The discipline and educative influence incident to the Civil War and the following reconstruction touched the boyhood of Thomas Hugh Somerville intimately, for he lived in a battle-stricken region. After a preparatory education from private tutors, he entered Washington College in 1868, at the period when that institution emerged from relative obscurity to recognized distinction because of its great president, Robert E. Lee, whose name, coupled with that of Washington, has honored it since his death. Those who knew the scrupulous integrity and devout religious character of Dr. Somerville bear in mind the great privilege that was his in youth of seeing, hearing, and knowing Lee. He greatly esteemed a personal letter he had received from Lee while a student; and he took great pride in the signature that his diploma carried.

Washington and Lee University recognized the distinction of her son at different times. In 1900 she conferred upon him the degree of LL. D. Three years later he was invited to accept a professorship of law there; and again in 1911, when a chapter of Phi Beta Kappa was established, he was one of the distinguished alumni invited to return and accept charter membership.

Dr. Somerville served as professor of law in the University of Mississippi from 1897, and as professor and dean of the Law School from 1906 until his retirement from both positions in 1913, continuing as dean emeritus until his death. After retiring he resumed the practice of law in Oxford, in his later years forming a partnership with Mr. Robert J. Farley.

Dr. Somerville was a thorough-going Democrat, with convictions on the principles of his party and enthusiastic in party activities. He was a delegate from his state to the National Democratic Convention in 1920. He felt a pride in the state of his adoption; he reverenced the names of the great men who gave his state distinction in the days of his young manhood. He was in the highest sense of the term a Christian gentleman. His sense of honor was singularly acute, and his conduct was accurately and consistently directed by it. For over forty years he was an elder in the Presbyterian Church, was active in all its work, and was repeatedly a repre-

sentative in the General Assemblies. But his religious life was not primarily denominational. His time, his energy, his means, were given generously to all good causes. He was a remarkably liberal man in his benevolences. Self interest or ostentation never allayed his generosity. It is this writer's judgment that no man ever more completely met the scriptural injunction that the left hand should not know the doing of the right. His influence will extend on and on; eventually undefined and unrecognized, it will still work. The memory of his fine character and good life should not soon pass.

JAS. STONE,
PHIL STONE,
J. W. T. FALKNER,
Committee.

PRESIDENT CURRIE: We were in the midst yesterday afternoon of a report by Mr. Shands, and there are other reports to be made. The time for the annual address has almost arrived. We have eight minutes. Are there other matters preliminary to that, or what is the pleasure of the meeting? Mr. Shands, what have you to suggest for your committee?

HON. A. W. SHANDS: As to further proceeding?

PRESIDENT CURRIE: Yes, sir.

HON. A. W. SHANDS: Why, it occurs to me that we should go ahead with the annual address, since our guest has arrived, and then after that is over, that we consult the pleasure of the Association as to what other procedure we should have.

PRESIDENT CURRIE: The Secretary has a few brief announcements.

SECRETARY JIGGITTS: I have a telegram from the Buena Vista Hotel, Biloxi, Miss.

Biloxi, Miss., May 1, 1929.

President Mississippi Bar Association,
Clarksdale, Miss.

"The Buena Vista extends to you a cordial invitation to hold your next convention in Biloxi. A wonderful convention hall and every facility for accommodating you at a very reasonable cost, a hearty welcome and an enjoyable time assured. Come on boys. The latch string hangs outside the door."

J. W. APPERSON.

SECRETARY JIGGITTS: Also a telegram from John J. Kennedy, Mayor of Biloxi.

Biloxi, Miss., May 1, 1929.

President Mississippi Bar Association,
Clarksdale, Miss.

"The City Commission as well as the entire citizenry of Biloxi unite in inviting the Mississippi Bar Association to meet here next year. Biloxi is the resort city of Mississippi with wonderful convention facilities. All of your members will have a great time in Biloxi in 1930."

JOHN J. KENNEDY, Mayor.

SECRETARY JIGGITTS: Also a telegram from the Biloxi Chamber of Commerce:

Biloxi, Miss., May 1, 1929.

President, Mississippi Bar Association,
Convention Headquarters,
Clarksdale, Miss.

"The Biloxi Chamber of Commerce and the Rotary, Kiwanis and Lions Clubs join hands in sending the Mississippi Bar Association a cordial invitation to hold their next convention in this historic city on the Mississippi Gulf Coast. It has been a number of years since your distinguished association has been here and we are looking forward to your return with much pleasure to a larger and more beautiful Biloxi. Our entertainments, features, and hotel accommodations are unsurpassed.

ANTHONY V. RAGUSIN, Secretary
Biloxi Chamber of Commerce.

PRESIDENT CURRIE: I wonder if there are any visitors from other states here today? We would like to have them introduced, if so, lawyers who are members of the Bar of other states. I am going to ask Judge Griffith to present Judge McDonald.

JUSTICE V. A. GRIFFITH: Ladies and gentlemen, I introduce Honorable W. D. McDonald, of Memphis. He is at home down here. I would regret very much to see the day when he would not be at home among us, and I take great pleasure in presenting Hon. W. D. McDonald. (Applause.)

JUDGE W. D. McDONALD: Mr. President, I am glad to be with you. (Applause.)

PRESIDENT CURRIE: I want to present Judge Cook of the Mississippi Supreme Court, if he is in the audience.

JUSTICE W. H. COOK: What do you want me to do?

PRESIDENT CURRIE: I always want you to agree with me, Judge. (Laughter and applause.)

JUDGE W. H. COOK: Gentlemen of the Association, while sitting here this morning I thought of a suggestion I would like to make to the Association to see whether or not you think it is worth while. We do not have the time in these associations to properly transact our business. We are in a situation this morning where the business of the Association is not going to be considered as it should be. We are discussing now whether or not we will have an afternoon session. Of course, it is a great deal of pleasure to attend these Wednesday night entertainments given by the local committees, but I was just wondering if it would not be a good idea for this Association to recommend to the local committees in the future communities that are entertaining us, to forego the Wednesday night entertainment and let us have a business session of the Association on Wednesday night so that we could discuss all of these questions and get through with them. We all know that

we have not had time this morning and we are not going to have time to discuss the questions that we have here to discuss. I just throw that out as a suggestion to do what you think about it in the future, and see if you do not think it would add something to the value of our meeting. (Applause.)

PRESIDENT CURRIE: Gentlemen, the chairman of the local entertainment committee suggests to us that on account of the weather we will not be privileged to have the entertainment this afternoon they had expected. They intended to drive to the Lake; so that if you desire to have an afternoon session there will be plenty of opportunity for it. I make that suggestion to you, not that you shall request, but in order that you may contemplate it.

The hour has arrived for the annual address, and I will ask the Honorable W. S. Welch, of Laurel, Miss., to bring to the platform our distinguished guest. (Applause.)

I present Honorable W. S. Welch of Laurel, who will introduce the distinguished guest and the annual orator on this occasion. (Applause.)

HON. W. S. WELCH: Mr. President, ladies and gentlemen, it is with very great pleasure that I approach the welcomed task of introducing our charming and distinguished guest. He is the leader of the Bar of his commonwealth. He has been very active in the work of the American Bar Association and all of us have profited by his work. As chairman of the Committee on Citizenship of the American Bar Association he organized and carried on the work of that Committee in arousing interest of the man of the street in governmental affairs. It is no exaggeration to say that he has contributed more than any one man in the United States to the arousing of interest in the study of the science of government that has resulted in the manifestation of patriotism in the average citizen that we have not seen at any time since America became a world power. With equal zeal and fidelity to the profession he has served as Chairman of the Conference of Bar Association delegates.

Mr. President, I know that this matter of introducing a speaker is sometimes a task that is not to be approached lightly; sometimes it is possible to go too far; it is easy to do as we lawyers are sometimes charged with doing, that of overstating our case, but with a guest so illustrious and with such accomplishments at the Bar as our distinguished guest has, with an orator of so many graces and charms, it

would not be possible for me to overstate my case today. I have not the imagination, I have not the faculty to do it, but I am wondering if I may tell you a story that I heard the other day that amused me very much. This story has do do with a negro funeral. When Sambo died his wife wanted to have the customary funeral and so a preacher with some repute as an orator was called in, and he started by telling of the virtues of Sambo as a member of the lodge. His wife Eliza listened with a good deal of interest, and she thought perhaps it might be true. She knew Sambo was a rather worthless fellow, but she was not a member of the lodge, and she did not know but what there was a side to his nature that she had not seen; but as he proceeded to tell about his good qualities as a neighbor she began to wonder; and then as he proceeded to tell of his solicitude for the welfare of his family and what a splendid provider he was, she was amazed. He then proceeded to tell about his benevolence and his piety and his church work, and she could not stand the suspense any longer, and she called to her son Mose and she said, "Mose, look in de coffin and see if dat is your pa." (Laughter.)

Mr. President, it occurs to me that a Democrat from the state of Delaware ought to feel at home in the State of Mississippi, and it is with great pleasure that I introduce to you Honorable Josiah Marvel, of Wilmington, Delaware. (Applause.)

ADDRESS OF HON. JOSIAH MARVEL

HON. JOSIAH MARVEL: I would not be true to my feelings if I did not on this, my first opportunity to stand in public before a Mississippi audience and on Mississippi soil, pay my tribute to that eminent scholar, to that great statesman, and to my personal friend, that son of your soil, John Sharp Williams. (Applause.)

Neither would I be true to my feelings if I did not then express to you my very great appreciation of the compliment that you paid me by inviting me to come and participate in this your annual meeting. Among other things it has given me the opportunity by personal visit and observation to become convinced that one of your problems is not only a Mississippi problem, but a great national problem, that interests the people of Delaware, and of California, and of Maine, as well as Mississippi. Its far reaching consequences can not be realized by the outsider until he comes and sees for himself.

I speak, gentlemen, of the great problem that must be in your midst. Then in addition it has given me the opportunity of seeing

the fellow members of our profession in a sister state meet together to consider your local problems, approaching it, of course, from a local standpoint; approaching it, of course, from a local point of view; to meet, as was said from this platform a few moments ago, your methods of life and your customs of living. In those local problems, purely local, the great national organization of the American Bar Association can help you but little indeed. That organization has for fifty years approached the administration of justice from a national viewpoint, hoping that here and there its suggestions from a national viewpoint may be taken up by the various and sundry states and the merit of those suggestions applied in a local, homelike way to the various states.

For these fifty years the number of problems appertaining to the administration of justice proposed by the American Bar Association have been many indeed. I can not now stop to tabulate these sundry and various proposals that have been led by the American Bar. But it is indeed useful to us all that there is a national organization, to get together year after year and debate and consider those things that would make for a better administration of justice.

Some of you are more or less familiar with the National Economic League, a group of citizens united in an organization to consider the problems of America. That League has created out of its great membership what it calls its Advisory Council of 5,000 American citizens distributed over all of the states in the Union. From time to time the Economic League submits to the council the question, "What is the most serious problem before the American people today?" Last December the question was again submitted to those 5,000 Americans. The importance of the question was decided and is always decided by that Council by the number of votes that are cast for any particular problem. In the canvass of December there were some fifty subjects submitted to the Economic League as constituting the problems for American thought. Perhaps you will be surprised to know that the one problem that received more votes than any other as the most outstanding problem of the American people was the administration of justice. There were fifty different subjects, as I said, proposed, some receiving few votes and some receiving more votes. There were those that favored taxation, prohibition, respect for law, war, peace, and many other problems that appeared important to the particular voter.

If we can conceive of these 5,000 members of this Council as constituting a fair cross-section of intelligent American thought, what, gentlemen, can be the state of the mind of the American people when through that cross-section it comes to us and says that the administration of justice is a more important problem to the American people than disrespect for law or prohibition, or many other problems that are now before it? If that is a fair cross-section of American thought—and I fear that it is true—

then I can say to you that this vote of this council in behalf of the American people presents to the bench and bar of America the greatest challenge that it has received since the beginning of our government. I say the challenge is to the bench and bar, because in the creation of the American governments, state and national, there is the division into executive, legislative and judicial.

The bench and the bar constitute and make up that third department of government. That is why I speak of it as our department of government. The American people throw that challenge into our teeth, upon the thought that we of the bench and the bar, constituting the third department of the government, our department of government, have the sole responsibility of correcting this confusion which they think exists in the administration of justice. They do not realize that they, the great mass of the people, have a thing to do or have ever had a thing to do with the administration of justice. Their general attitude of mind is that "It is the job of the lawyer and the judge, and not ourselves." They do not go back 75 years in the life of the administration of justice in this country and see the picture of the great beginning of the control of the administration of justice by the people by the adoption of the Field Code in New York, that great swing in the minds of the American people that the legislative department of government, either through constitution or through legislative act, should properly create a department of justice, should properly create courts for the administration of justice, and then tell those courts and those lawyers how to perform their duties. But they did it. The action of the people of the State of New York was followed by the people of half the states in the Union in the creation of almost complete codes of civil practice, telling you and me just exactly what to do in the administration of justice, and when to do it. It has been followed more or less by every state in the Union. You have it here to a greater or less degree, where the legislative department of government has reached out with its legislative hand and laid it upon the judicial department of government and told it how to perform its duties. And we gentlemen of the bench and bar have stood by for these 75 years, knowing, if anybody knows, that the members of the bench and the bar are best qualified to take those steps that will tend to the greatest extent for the proper and efficient administration of justice.

So, as I suggested a moment ago, the people, through the legislative department of government, have participated in a way that they have not been conscious of, I am quite sure, and that, though conscious of it, have permitted it to go on without protest. It is a curious thing that the sensible men, the ordinary business men, who compose and constitute our legislatures, would not build a house without the expert advice of an architect. They would not build a road without the expert advice of a road

engineer, and yet for 75 years, they have gone and built a method for the administration of justice without any expert advice whatsoever.

Sometimes I think that even we of the bench and the bar have not grown fully conscious of the situation. But the American Bar Association a few years ago began spasmodically to consider the situation, and as one step in the direction of meeting our responsibilities as the third department of government, they created a committee on Rule Making Powers of the Courts, to consider that subject and to lay the result of their deliberations and thought before the American Bar. They did that to a very considerable extent and two years ago they began to get in contact with various Bar Associations of America, pointing out the great benefit that might arise from the rule making power of the courts, and I will not take any great length of time to refer to those benefits. It seems to me that the benefits are so clear, so positive, so undebatable, that we do not need to stop to discuss the merits of it for any great length of time. It is enough if I here today simply call attention to the method that has been used in this direction in England during the last 75 years.

You recall the steps taken by the Parliament of England 100 years ago creating a commission for the development of the making of rules by courts to expedite and carry on the administration of justice. You will recall that their statutes of 1850 and 1852 led up to the great Judicature Act in England in 1875 that created a Rules Committee consisting of eight judges and four lawyers, with the power of giving notice in 40 days that it was proposing to create a new rule or amend an old one, and at the end of 40 days to promulgate that rule with the force of law, except that either house of Parliament might have the right to veto it. But during these 50 years Parliament has never vetoed a rule promulgated by the committee, showing that the English people are satisfied with the rule making power of the courts in that it tends to expedite and make more efficient the administration of justice by those who know how.

It would seem that the American people, upon the other hand, are opposed to trusting the bench and bar with the duties and the responsibility of making rules that would govern the action of litigants in the courts. That may be true as to ancient courts, but you take the commissions and courts that have been created, either by national or state legislatures, during the last 25 years, and you will find that in every one of them, both state and nation, your industrial boards and all of them, have been given the power to make rules to govern the procedure of those various boards and commissions. So the American people apparently are not opposed to trusting bench and bar with the right to control absolutely the administration of justice, but they have simply retained holds that were taken about 75 years ago upon the ancient courts, and they have not been let go, and they will not

let go until the bench and bar of the state and nation are ready to stand up and announce to the American people at large, "We of the bench and bar are ready to assume the responsibility that will be imposed upon us by having you clothe us with the power of making rules that will govern and help carry on the administration of justice in the various states and in the nation."

While this has been urged by those who believe in it, there are those who have said time and again it is unconstitutional legislation; it is a delegation of legislative power that can not be carried on in our system of government. By good fortune we happen to have available to us the action of a sister state that will help you in Mississippi to consider the problem, that will help them in every state in the Union in considering this problem from a constitutional standpoint.

In 1925, the people of the State of Washington, through their legislative department of government, reached the conclusion urged as I said a while ago by some members of the bar throughout the country, that the men most capable of devising the pleadings of practice and the procedure for the administration of justice are the bench and bar of the State of Washington, and that legislature proceeded to enact this statute. Let me read it to you. This is worthy of your thought:

"An Act to promote the Speedy Determination of Litigation on the merits and authorizing the Supreme Court to make rules relating to pleading, procedure and practice in the courts of this State.

"Section 1. The Supreme Court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, and appeals and proceedings of whatever nature by the Supreme Court, Superior Courts, and justices of the peace of the State of Washington. In prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

"Section 2. When and as the rules of courts herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no force or effect.

"Section 3. That this act shall not be construed to deprive the Superior Courts of power to establish rules for their government supplementary to and not in conflict with the rules prescribed by the Supreme Court."

The Supreme Court of the State of Washington, acting under the authority given by the legislative department of the govern-

ment, proceeded to promulgate a series of rules, one of them dealing with the taking of testimony. The rule was called in question, and the whole statute was challenged as being unconstitutional. I think that the same problem has been considered in your State, and it may be that your constitution is such that the decision of the Washington Court in this case would not be on all fours. But let me read you what the Washington Supreme Court said about that challenge of unconstitutionality.

"In its essential matters, the argument upon this point is that, from the beginning of statehood, it has always been the recognized policy of the state that the legislature should prescribe procedure and practice in the courts, leaving only to them the right to make rules involving decorum and orderly government. While it is true that the legislature has functioned in such a capacity ever since statehood, that fact becomes not at all controlling in determining whether the making of such laws for procedure and practice is in itself an exclusive legislative function. Indeed, there is excellent authority, from a historical as well as legal standpoint, that the making of rules governing procedure and practice in courts is not at all a legislative, but a purely judicial function. In 1792 the Attorney General of the United States requested information from the United States Supreme Court concerning the rules and regulations of the Court. The Chief Justice, speaking for that tribunal, said that the Court considered:

'The practice of the courts of Kings Bench and Chancery in England, as affording outlines for the practice of this Court; that they will from time to time make such alterations therein, as circumstances may render necessary.'

"At the time of the pronouncement of the Court, the procedure in England was controlled by rules enunciated by the courts. However interesting this question may be when reviewed from the point of legislative usurpation of judicial powers, it will be unprofitable to further delve into the argument in this opinion, since there confronts us always the debatable question of whether long acquiescence by the courts of the state in legislative control of these matters is not sufficient to require a holding that the legislative body, if it so desires, can continue that supervision.

"The point here in controversy can be decided upon a far more stable foundation. Assuming the right of the legislature to make rules for the court, and acknowledging its continued action in that respect, it does not follow that such action is a legislative function.

"We think it follows that the Legislature, although formerly functioning in this State as the source of rules of practice and procedure in the courts, did not, in so doing, perform an act exclusively legislative, and may, if it so desires, transfer that

power to the courts, without such act being a delegation of legislative power.''

That is the most thorough judicial pronouncement upon that question that has ever been made by the court of last resort in any state in the Union. I have taken this much time to quote from it fully in order that it may perhaps convince you, as it convinces me, that the bench and bar, believing in the rule making powers of the courts, may go forward in confidence that they are on the right track and upon safe grounds.

Another question arose in that court, as to whether or not a legislative act of that sort empowered the Supreme Court of the state to promulgate rules for all of the inferior courts of the state, and the court went further in that opinion and decided that the court of last resort had the power under this statute to make rules for all of the inferior courts of the state, subject, however, in that case, to the right under the statute of the inferior courts to make rules supplementary to the rules promulgated by the Supreme Court.

With that holding of a court of last resort, and a very strong court at that, grounding the foundation of our argument in soundness and safety, then the question comes to you and to me, whether there is merit in the simple question of whether the courts of a state should have the full power and right to prescribe all of the rules that in their judgment are necessary for the control of pleading and practice and procedure in the courts. I am strongly convinced of the merit of the proposition, not only upon the ground that it will expedite, that it will make more efficient, that it will simplify, not only upon the ground that the courts, by and with the assistance of the bar, are the most capable bodies in American life to prescribe those rules and regulations, but what appears to me to be upon the more far reaching and the sounder ground, is that it will put upon the bench and bar the responsibility of carrying on those duties which the people of the state and nation place in our department of government, the judicial department of government of our country.

We, gentlemen, all occupy our office as attorney at law by and through the law made by all the people of your state and mine, whereby you and I are privileged to do a thing that is not granted to the people at large about us. We come to the bar and are obliged to take an oath of office, and when once that oath of office is taken there is no shirking anywhere at any time our being in that office of attorney at law to the courts of our particular state and jurisdiction. It can not be, gentlemen, that the Constitution of Mississippi creating a judicial department of government, and thereby creating the office of attorney at law, did it for the sole purpose of enabling you and me to make our living through creation of this particular office. They created you by this legislative proceeding a member of the judicial department of your government, continuous and for life, or dur-

ing good behavior. You can not read anything else into that Constitution except there is a duty on you to the people of your whole state to see to it that you give your best, not only to a single client from time to time, but your very best to all of the people of the State of Mississippi to see to it that the administration of justice in behalf of all the people of the State of Mississippi is the very best that the bench and bar constituting the department of justice can create and carry on. (Applause.)

Now, if that be true, then each of us reviews in our own mind what, outside of a particular duty towards a particular client, have we done toward giving to the people of Mississippi the best possible administration of justice to the end that the disputes between man and man may be more expeditiously, more cheaply, more promptly and more efficiently settled as between man and man; and I ask you whether or not there is any better way for you to go to the people of Mississippi and say, we, the attorneys at law, we, the judges created under the law, created by the legislature of our state, than by saying we are ready to assume the full responsibility of administration of justice if you will put the full and complete power in our hands.

We have been very loathe, we are still loathe throughout all this whole country in assuming that position. That is shown by the fact that in almost every state in the Union there are powers in the courts of promulgating rules that have not been exercised because the courts have not seen fit to go forward to the assumption of the responsibility that would arise out of the full exercise of the power that already exists. The members of the bar have not seen fit to assume their full responsibility by getting up and saying to the courts, "There is a rule making power existing in you that you should exercise for the benefit of litigants in your court." And the bench and the bar together, judges and lawyers, all of the members of this, our department of government, have not seen fit, except in the few and rare instances of Washington, Delaware, Connecticut and Massachusetts, and, to a limited degree in Michigan and Illinois, to say to the legislative department of government, "If we, this judicial department of government, are desired by you to assume the responsibility, we, the bench and the bar, will assume it, and then if there is lack in those things, that you think do not make properly for the administration of justice, then you can put your finger upon the responsible party."

Gentlemen, speaking broadly for the American Bar, I say with great confidence and earnestness, that unless we, the bench and the bar, move forward in this thing, the people are going to do it in their own behalf. If it be true, as I stated in the beginning, that many American people think the greatest problem in American life is the administration of justice, you may be sure that if we do not go forward to cure the evils, they will. They are going to expect efficiency in all American life. In every

business and profession of which they know, they have seen progress and efficiency, going forward. They say if every business and every profession and every science has progressed to meet the needs of the times, the administration of justice shall not be exempt, and if we do not go forward to meet the needs of these great complications of our civilization, you may be sure the people that created us, that created our department of government, will assume the duty and responsibility of doing what they think in their crude way of thinking will meet the advanced administration of justice. Now, my fellow members of my profession, this will not do. The responsibility, my friends, is upon us, and it would be a great day in the life of the judicial department of the State of Mississippi if there could go out a feeling from this Association that we of the bench and the bar of this state will rededicate ourselves more fully to the administration of justice to all of the people of the State of Mississippi, and it is to be hoped that that feeling will be abroad in your minds in order that you may definitely plan to go forward to do those things in all directions that primarily rest upon the bench and the bar of your state, in order that our department of government may properly take its place in the government of the people of Mississippi. (Great applause.)

HON. A. W. SHANDS: Mr. Chairman, it gives me pleasure to announce that Judge Julian Wilson, at one time a member of the Bar of Mississippi, now a member of the Bar of Shelby county, Tennessee, is present, bearing an invitation to this organization, and with your permission I take pleasure in presenting him.

PRESIDENT CURRIE: Bring him around, Mr. Shands, please. Gentlemen, I present Mr. Shands.

HON. A. W. SHANDS: Mr. President, and fellow members of the State Bar Association, it is my pleasure to introduce now a man who has been for long years my great friend. You will notice some physical peculiarities of the man who will address you. This was commented upon in the Court of Appeals of the State of Tennessee on one occasion. My friend was presenting a case and he stated his facts; in reply to that the attorney on the other side stated some facts. The court said to him, he says, "Will the gentleman yield to a question?" He says, "Yes." Well, the court said, "Judge Wilson says the facts are as follows. What do you say to that?" This gentleman replied, "It only goes to show how God Almighty has softened up in His punishment. In the days of Ananias and Sapphira he struck them dead for that. Now he only makes them bald-headed." (Laughter and applause.)

JUDGE JULIAN WILSON: Mr. President, and my fellow members of the Bar Association of the State of Mississippi, I suppose you were at once struck in the anecdote related by my long time friend with the difference in our careers. You at least have it upon his testimony that on one occasion at least in my life I stated facts. (Laughter.) I hope that some day that may be said of him. (Laughter.)

Now, Mr. President, and gentlemen, I am the bearer of a message to you today from the Bar Association of Shelby county, Tennessee. I suppose that I was chosen as the messenger because it was believed that some of you would know me, and, I suppose, even strange as it may be, that it was also supposed that some of you would believe me. As you doubtless know, the American Bar Association will meet with us in Memphis on October 23, 24 and 25, I think, of this year. We of the Shelby County Bar Association think that is rather a great occasion. We believe it will be of advantage ultimately to the people if we of Tennessee, you of Mississippi, and you of Arkansas, can get together and mingle in discussion, in exchange of experiences, in those things which go to upbuild the profession and as flowing from it those things that go to upbuild and improve the administration of justice, the first and primary function of government, if we get together, if we talk, if we exchange experiences, and if we endeavor to improve the condition and standing of the bar, as well as to improve the management of the affairs of the people in general matters, and particularly in the administration of justice.

They expect to have with them—the program is not definitely set, but they feel sure of having with them on that occasion at least the two members of the Supreme Court of the United States who come from the state of Tennessee, those distinguished gentlemen, Justices McReynolds and Sanford. They hope to have present with them, participating in the discussions in the meeting, that distinguished jurist and lawyer, Judge Charles Evans Hughes; and they have many other, not only distinguished and experienced, but delightful speakers in contemplation for their program.

It goes without saying that you will be welcomed guests and we want you to come there and act with and be a part of the Memphis and Shelby County Bar Association in entertaining these distinguished guests and brethren in the craft which we have chosen. I think there are practical reasons why you should go there, too. I have been going

to bar associations now for a long time. I have been listening to the discussions and occasionally taking part in them. In all that time I can hardly remember a single idea that was presented and seriously discussed which looked to the welfare, the material welfare of lawyers as a class, that was in the least degree selfish. I have heard many discussions of improvement of the basic principles of jurisprudence, of more in the administration of justice, of many as to upbuilding of the bar, and I do not think I have ever heard any discussions that looked to the selfish interests of lawyers alone. I am not sure at all that it has not been carried to an extreme, as much as we admire the spirit that emanated it, because it has seemed to me that the lawyer has rather lost than gained in force and in importance in the management of the affairs of the nation, and I think their unselfish devotion to the interests of government and the people, without looking in any degree to their own protection in the more material matters of this world, has tended to lessen their influence and their importance; and for that reason I think it more behooves them now than it did when I was a younger man, to consult together, and maintain that importance, that standing, that dignity, and that leadership in the affairs of the people, in the affairs of the state, in the affairs of the nation, that we will want to look to with so much pride, that we first had in the bar.

Now, gentlemen, I do not want to burden you longer, except to say this in conclusion, the gentlemen who will be at that Bar Association will be very distinguished, very learned. You men who have not attended many national meetings of the bar, I wish you would, and particularly those of you that I have here learned to know, that you would all come up and keep me company and let me feel that I am at home while those distinguished visitors are present. I thank you. (Applause.)

PRESIDENT CURRIE: I know that for the Association I express the feeling of every member when I say to Judge Marvel how glad we are that he came and spoke to us. Judge, I am sure we will profit greatly from that elegant address.

And I say to Judge Wilson, we are delighted to have him with us and we appreciate his message. He was a college mate of mine some years ago. I love him greatly. We have many Mississippi lawyers in Memphis. In fact, except for the Mississippi lawyers there would hardly be any Memphis bar.

JUDGE W. H. POWELL: I move that we accept the invitation of my friend, Judge Wilson, to attend that meeting in connection with the Shelby County Bar Association.

(Said motion was duly seconded.)

PRESIDENT CURRIE: Any discussion? The motion is that we accept the invitation of Judge Wilson to go to the American Bar Association at Memphis.

JUDGE A. A. ARMISTEAD: I move that the thanks of the Association be extended to Judge Marvel.

PRESIDENT CURRIE: Those favoring the motion of Judge Powell will say AYE; opposed, NO. The motion is carried.

I have great pleasure now to present the motion made by Judge Armistead that the thanks of the Association be extended unanimously to Judge Marvel by a rising vote.

Those favoring it will rise. (Long and continued applause.)

HON. A. T. STOVALL: Mr. President, I have been requested to announce that the American Judicature Society, which has been so favorably spoken of here this morning by the distinguished speaker, and which is headed by Charles Evans Hughes, John W. Davis, the Judges of the Supreme Court of the United States, the Circuit Court of Appeals, and many distinguished lawyers all over the country, are issuing a journal called the American Judicature Journal that is absolutely free to the bar of the country on the payment of the postage. I am requested to announce and ask each lawyer as he goes out the door give his name, and post office address, and 25 cents, and the journal will be sent him for a year. He will find it full of good information for the lawyer who wants to promote the administration of justice. I hope every one of you will leave a quarter and your name and post office address as you go out.

PRESIDENT CURRIE: Gentlemen, we revert now to the report of the Committee of Mr. Shands.

HON. A. W. SHANDS: Mr. Chairman, I would like, as it is time for the adjournment, to move the postponement until another session of this Association of Section 3 of this report which was under consideration at the adjourning hour on yesterday afternoon, so that between now and then it may be more fully considered, and reserving to myself the right in the next issue of the Journal to fully set out in print the idea of the Committee in making this recommendation, so that when the next meeting comes we can have a vote without any extended argument or discussion, as

everybody can make up his mind how they want to vote on the question by that time.

SECRETARY JIGGITTS: Second the motion.

PRESIDENT CURRIE: Is there discussion? Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

HON. A. W. SHANDS: There is one other section to this report which I do not think will precipitate any particular argument. If it does, it can be postponed. I think it is a matter that should be considered, as it results in justice to everybody. I do not think that it affects any particular class of people one way or the other. It is as follows:

"Four. We are of opinion that Section 1522 Hemingway's Code, 1927, being Section 1821, of the Code of 1906, should be so amended as to permit a defendant in an ejectment suit to deny possession, as now provided, and also plead that if he be mistaken, and is in reality in possession of the land called for by the description in the declaration contained, that he has been in such possession for more than ten years and that the bar of the statute of limitations has run in his favor.

"Judge Cox and Mr. Heidelberg concur with the chairman in all of the recommendations.

"Mr. Guice, a member of the committee, has up to this time not replied."

I move the adoption of Section 4 of the report of this Committee.

(The motion was duly seconded.)

PRESIDENT CURRIE: Is there discussion? Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

HON. A. W. SHANDS: Your Committee, Mr. Chairman, now having reported, begs leave to be discharged.

PRESIDENT CURRIE: I discharge the Committee and thank them for their diligence.

Are there other committees to report? We will have the report of the Law Revision Committee, Mr. Dulaney.

MR. J. W. DULANEY: Mr. Chairman, the report of the Committee is as follows:

REPORT OF SPECIAL COMMITTEE ON PROPOSED COMMISSION ON LAW REVISION

To the President and Members of the State Bar Association:

At the last meeting of this Association it approved the principle of a continuous and systematic revision of the general statutes substantially in

accordance with the provisions of House Bill No. 1101 of the regular 1928 session of the Legislature. This special committee was appointed to co-operate with the Committee on Jurisprudence in studying the problem of defective statutes, considering the provisions of that bill and creating interest on the part of members of the bar. This we have endeavored to do, under the conviction that the matter entrusted to us possesses an importance and possibilities for the good of the public and the profession as great as any heretofore undertaken by this or any other bar association.

In the report submitted at Gulfport by Judge Griffith on behalf of the Committee on Jurisprudence appear these statements: "The general statutes which affect the administration of justice, the conduct of the public business and the lives, liberties, property rights, and business relations of the citizens should be as free from ambiguity and conflict as human wisdom can make them. . . . The problem of defective enactments is a continuing one and without any hope of attaining perfection it is inexcusable that we do not seek to approach it in a matter of such importance. . . . The problem can only be solved by intensive study and scientific effort somewhat similar to the work the American Law Institute is attempting for the common law." We have found no one who disagrees with these statements.

If a bad situation in regard to the statutes has been endured for so long, it has been perhaps because we thought it unavoidable under our system of government. We do not think that such is the case. Our Legislature has adopted several of the Uniform Laws drafted by experts, and doubtless would welcome further expert assistance.

The bill provides for a commission of three members selected by the Governor, the Attorney General, the Judges of the Supreme Court, and the Chairmen of the Judiciary Committees. The duties of the commissioners are to prepare and file at least sixty days before the convening of each regular session of the Legislature a report calling attention to such general statutes as in the opinion of the Commission may be conflicting, of doubtful meaning, unconstitutional, obsolete or have a tendency to unduly complicate the administration of justice or work a hardship or for any other reason require revision, and in such report to set forth additional propositions requiring legislation in the interest of certainty in the law and to submit drafts of such amendments, revisions and acts as the commission may recommend for enactment, together with the reasons of the commission for recommending each, and also drafts and revisions of such acts as may be referred to the Commission by either house of the Legislature for that purpose.

The only change in the bill which we recommend is that the first sentence of Section Two be amended to read as follows: "On the first Thursday in April in the year 1930 and every fourth year thereafter the Governor, the Attorney General, the Judges of the Supreme Court, the Chairman of the Judiciary Committee of the Senate, or such other member of the Senate as the Senate may designate, and the Chairman of the Judiciary Committee of the House of Representatives, or such other member of said House as the House may designate, shall meet at the office of the Governor for the purpose of electing such Commissioners." We make this suggestion because the Chairman of a Committee holds his position under the rules of his house, and not under statute.

We do not find that a similar plan has been tried in any other state except Wisconsin. There the Justices of the Supreme Court and the Attorney General select a Revisor of Statutes, who is provided with assistants, clerks and stenographers, and who, among other duties, has those of formulating and preparing a plan for the order, classification, arrangement, printing and binding of the statutes and presents to the Judiciary Committee in such bills as he deems best such consolidations, revisions, and other matters relating to the statutes as can be completed from time to time. This plan has been in effect in Wisconsin for the past nineteen years, and we are advised by the President of the Wisconsin State Bar Association and the Revisor of Statutes of that state that it has proven very satisfactory.

We believe that greater skill and learning could be brought to the task by having three Commissioners selected from leading members of the bench

and bar as contemplated in the bill proposed here, than would be possible if the responsibility rested upon a single person, as under the Wisconsin plan. It will be noted that in Wisconsin the Governor and representatives of the Legislature do not participate in the selection of the revisor. We think that House Bill 1101 properly gives the Governor and representatives participation in the selection of the commissioners. We do not recommend the provision of the Wisconsin Act for the re-publication of the complete Code after each regular session of the Legislature.

The work of your Committee has been done almost entirely by correspondence. We have written letters to members of the bar in every county of the state. Instead of printing a new report, as suggested, we have had re-printed the report on the subject which was adopted at Gulfport, and have distributed many copies. It has also been re-published in several newspapers and the matter has been discussed before a number of Civic Clubs throughout the state. The response has been gratifying and we believe that if this Association and its members will continue their efforts the bill can be enacted at the 1930 session. Our further recommendations are as follows:

1. That the Association adopt as one of its major objectives the enactment of this bill or one containing substantially the same features.
2. That the President of this Association be authorized to appoint a Committee or such Committees as he, with the advice of the Executive Committee, may deem best for this purpose.
3. That each County Vice-President of the Association be charged with the duty of bringing the matter to the attention of his Senator and Representatives in the Legislature and the public of his county generally.
4. That this Committee be discharged.

Respectfully submitted,

J. LAKE ROBERSON,
A. T. STOVALL,
T. C. HANNAH,
WM. HEMINGWAY,
J. W. DULANEY,
HERBERT HOLMES,
Committee.

HON. J. W. DULANEY: Mr. President, after much was said in the address of our President on yesterday morning in regard to this matter, and after the remarks of our distinguished speaker this morning, it is hardly necessary that we spend a great deal of time discussing this report, as I see it.

When this Association at Gulfport last year, on motion of Judge Griffith, seconded, I believe, by our Chief Justice, Judge Smith, committed itself to the principle of a systematic, continuous revision of our general statutes, it took a step forward as great as that which any Bar Association in this country has ever done. A few years ago a voluntary committee of lawyers met. They were under the conviction that the uncertainty which existed in the law was intolerable. They met because they believed there was a remedy and the American Law Institute grew out of that meeting. The lawyers of Mississippi have long felt that the condition which existed with reference to our statutes and their many defects and ambiguities is intolerable,

and it was because we believe that there is a way of remedying that situation that we took action on it at Gulfport last year. I believe that the time will come when the historian of law in the future will look back on the years we are going through now as the beginning of a sort of renaissance period in the law.

The American Law Institute is tackling just half the problem, a restatement of the common law. With that perfectly restated, we still, as Judge McGowen pointed out yesterday, are controlled in perhaps a majority of our cases by some statute, and with the defective statutes, a perfect restatement of the common law does not remedy the situation. A few years ago most of us remember, or many of us remember, that the yellow fever annually took a great toll in this section, or periodically took a toll. And now none of us have fear of taking the final appeal on a yellow fever record. A few years ago diphtheria took a toll amongst our children, and you and I have no fear for our children now because of antitoxin.

The law has not progressed under the scientific and systematic methods that have been used in other professions, and that is the very thing that we are attempting to do under this resolution.

Mr. President, I am glad to say to the members of the Association here, and I know they will be glad to hear that the members of our present Code Commission contemplate including this act that the Association has approved in the new code. I move the adoption of the resolution.

(The motion was duly seconded.)

PRESIDENT CURRIE: Is there discussion? Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

Are there other committees to report? The Committee on Jurisprudence and Law Report, is that report here? The Legislative Committee, is there a report? Special Committee on Rule Making Power of the Courts? Other special committees, if any. Are there any special committees? Is there any report from the Mississippi Law Journal Advisory Committee, Judge Kimbrough?

JUDGE T. C. KIMBROUGH: Mr. President, I do not think it is necessary to make any report, as that matter was fully gone into on yesterday. The whole matter was before the Association. I do not think I could add anything to it.

PRESIDENT CURRIE: We expected Honorable W. H. Watkins to make some remarks on the American Law Institute. He was not able to be here, and Mr. George Butler will make a brief statement on that. Is Mr. Butler here?

HON. A. W. SHANDS: He just went out of the door.

PRESIDENT CURRIE: Are there any other reports of committees that have been omitted? If so, we will have them.

HON. J. W. DULANEY: I forgot to say there are many members of the Association present who were not at Gulfport. Some perhaps are not familiar with the measure that we were discussing, and we have here a few copies of the report of Judge Griffith submitted last year, and I would be glad for any of the members to take them as they go out.

PRESIDENT CURRIE: I will now present Honorable George Butler who will make a statement regarding the American Law Institute.

HON. GEORGE BUTLER: Mr. Will Watkins was expected to make this statement, and he was unavoidably detained in Jackson. He asked me to make it in his stead, and I agreed to do it. But I am not going to do it, because I think that there are other matters of more importance to this Association, and I do not feel like it would be proper for me to take the time that would be required to make this statement that I had in mind with reference to the work of the American Law Institute. For that reason, and with the permission of you, Mr. President, I would prefer not to make the statement, because it is nearly one o'clock now, or twelve-thirty.

PRESIDENT CURRIE: I announced yesterday that Judge J. Morgan Stevens had been appointed to represent this Association at the American Law Institute in Washington, May 9, 10 and 11. I thought it was eminently fitting that a man who was qualified by having been himself a chancellor and a supreme court judge and who is now the able and efficient chairman for the Code Commission, should represent this Association at the meeting of the American Law Institute, so I appointed Judge Stevens to that position.

What other matters have we now?

HON. S. D. NEILL: Mr. President, I have been requested, if the time is now opportune of so doing, to introduce a resolution on the part of one of the distinguished

members of this Association who has been prevented from attending by sickness in his family. I want to say before presenting the resolution that there are many reasons why a resolution of this kind should be adopted, that I am calling to your attention at the request of this distinguished member of the bar. You can go to the government hospitals of this country, and you can give reason after reason why this resolution should be adopted. You can go anywhere, and you can see mothers on the streets dressed in black, strong reasons for the adoption of this resolution, and without further comment I am going to hand the resolution up and ask that it be read.

PRESIDENT CURRIE: I will ask the Secretary to read the resolution.

SECRETARY JIGGITTS: The resolution is as follows:

"BE IT RESOLVED by this Association that we believe it is the duty of this Government, through the President of the United States and the Senate, to become a member of the World Court and for that purpose to accept the new protocol which embodies the formula of Hon. Elihu Root. And we urge action to that end upon our Senators."

HON. S. D. NEILL: Mr. President, just one minute. That was sent here and I was requested, as I said, to deliver it for the consideration of this Association, by Honorable Leroy Percy, of Washington county. Now, Mr. President, just one other matter, we of this state have as a rule been first and foremost in every place, with no cause and no reason to fear entry into a World Court by reason of lack of mental capacity on the part of those that will appear for the American people, and I move the adoption of this resolution.

HON. GEORGE BUTLER: I second the motion.

PRESIDENT CURRIE: Is there discussion? Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

It is time for the election of officers, according to our program. Shall we proceed with the election of officers? The election of officers is in order. Nominations for President are now in order.

JUDGE G. GARLAND LYELL: Mr. President, I am sure that we will agree that one of the outstanding features of this convention was the splendid reports made on yesterday by three distinguished examples of the product of

the University of Mississippi Law School. It seems to be generally understood that the convention next year will be held at the University, and by that time the Law building will have been completed and we will see the realization of our hopes, ambitions and ideals along that line. It has been said by the Gallilean that "By their fruits ye shall know them," and it is true of humanity in all its relations. Certainly, if the University Law School is to be tried by that standard, we had exemplified yesterday the truth of the statement that the Law Department of the University of Mississippi is indeed functioning splendidly and better than it has ever functioned before. While the results have been obtained by the splendid faculty, yet there must be a unified command of some sort, and we can not but believe that the distinguished dean of the law department is entitled to a great part of the credit, if not the lions' share of the credit for the results that have been accomplished in training the students at the University Law School, and I can think of no finer tribute to pay to a distinguished Mississippi lawyer than that the dean of our Law Department at our State University should be elevated to the presidency of this Association, and I take great pleasure in nominating Judge Kimbrough for the presidency of the Association. (Great applause.)

HON. A. T. STOVALL: Mr. President, I take great pleasure in seconding the nomination of Judge Kimbrough. (Great applause.)

HON. H. A. SHOTTS: I move that nominations for President be closed.

HON. GEO. BUTLER: I second the motion.

PRESIDENT CURRIE: Those favoring the motion will say AYE; those opposed, NO. The motion is carried.

HON. H. A. SHOTTS: I move that the Secretary be instructed to cast one vote for Judge Kimbrough for president of the Association, and that the election be declared unanimous.

HON. GEO. BUTLER: I second the motion.

SECRETARY JIGGITTS: Mr. President, and members of the Association, I take great pleasure in casting one ballot of the Association for Judge Kimbrough as President for the ensuing term.

PRESIDENT CURRIE: I have great pleasure in announcing that Judge Kimbrough, the Dean of our Law School, is elected President unanimously for the ensuing

year. I will ask Judge McIntyre to escort Judge Kimbrough and Mrs. Kimbrough to the platform. (Applause.)

JUDGE McINTYRE: Mr. President, I think Mrs. Kimbrough should make a speech. It affords me very great pleasure to have the privilege of presenting to this Association our new President. The object of my suggestion that Mrs. Kimbrough make a speech, is that I have had some connection in the work, being on the committee that was appointed at Jackson, of the Bar Association, to work for the construction of the new Law building. It has been my pleasure also to know Mrs. Kimbrough and Judge Kimbrough for a number of years, and Judge Kimbrough, I will say frankly, is not entitled to all the credit for the things that he has accomplished in the Law School in his work at the University generally, for he has been assisted all the way through by Mrs. Kimbrough, and in presenting Judge Kimbrough here as our new President I will also present Mrs. Kimbrough, who will stand. (Great applause.)

JUDGE T. C. KIMBROUGH: Mr. Chairman, ladies and gentlemen of the Mississippi State Bar Association, of course, no one of you would doubt for a moment that I appreciate deeply what you have done today. I appreciate the fact too, that a great deal that has been said that I have done is through the influence and help of my wife. I acknowledge that to be true. She has always aided and assisted and encouraged me in my efforts to build up the great Law School at our State University.

You have put upon me by your action today a great responsibility. I accept the responsibility. I appreciate the fact that this body of lawyers, a few years ago when I made an appeal to them for help at the University in order that we might place our State Law School upon proper footing, that you sympathetically and at once responded, and it has been through your aid and through your help that we have been able to accomplish what has been done at our State University. Therefore, by reason of the fact that you have so gladly and so willingly helped in bringing about this result, I am glad to assume this responsibility and to assure you that I will do everything within my power to add some little something in the way of service to the upbuilding of our profession through the Bar Association in our State. I have always felt and I feel more so today that a great deal can be accomplished, and that there is a great deal to be accomplished, and it can be accomplished through the united efforts of this Bar Association.

Gentlemen, from the bottom of my heart I thank you for the honor that you have conferred upon me. (Great applause.)

PRESIDENT CURRIE: May I present Mrs. Kimbrough? Let me introduce Mrs. Kimbrough.

MRS. KIMBROUGH: I only claim to be the mother of the Law School. My lawyers who are here will tell you that I love them all, and their success means so much to me. (Great applause.)

PRESIDENT CURRIE: Nominations are now in order for Vice President.

HON. A. W. SHANDS: Mr. President, in picking out a man who will be Vice President, my attention is, of course, drawn to the city that has so cordially acted as our host on this occasion. There is a young man, a man of distinguished lineage in the State of Mississippi, whose father and forebears before him made history in the judicial records of the State of Mississippi. I want to nominate as Vice President Sam C. Cook, Jr., of Clarksdale. (Applause.)

JUDGE ARMISTEAD: I move that nominations be closed and that the Secretary cast one vote for Vice President for Mr. Cook.

HON. GEO. BUTLER: Second the motion.

PRESIDENT CURRIE: Is there discussion? Those favoring the motion will say AYE; opposed, if any, NO. The motion is carried.

SECRETARY JIGGITTS: Mr. President, and members of the Bar Association, I take great pleasure in casting one ballot for Mr. Sam C. Cook, Jr., for Vice President of this Association for the ensuing term.

PRESIDENT CURRIE: I have great pleasure in announcing that Mr. Sam C. Cook is unanimously elected as Vice President for the ensuing year. Mr. Cook, stand up. Let's see you.

MRS. COOK: Sam is not in town. I feel very appreciative of this compliment to my son, and I know he will appreciate it. I can not express to the lawyers of the state how much I appreciate it.

PRESIDENT CURRIE: We are glad to have you with us, Mrs. Cook. (Applause.)

We have some executive committeemen to elect, and we usually elect delegates to the American Bar Association. Our custom has been to make nominations for executive committeemen, one from each Supreme Court District. I suggest that the Southern District meet in that end of the

room, the Middle District in the center, and the Northern District on the other side, and make your nominations for executive committeemen, one from each district. We will have the report from the Northern District.

(The following nominations were thereupon made for executive committeemen):

Northern District, R. C. Stovall, of Okolona, Miss.

Middle District, J. L. Williams, of Indianola, Miss.

Southern District, Judge D. M. Russell, Gulfport, Miss.

PRESIDENT CURRIE: The Constitution provides for nominations by districts. Customarily we have not elected them, so far as I know, beyond that. I think a motion would be in order to accept the nominations.

HON. R. H. POWELL: I move that the Association accept the nominations as made.

SECRETARY JIGGITTS: Second the motion.

PRESIDENT CURRIE: Is there any discussion? Those favoring the motion will say AYE; opposed, NO. The motion is carried.

Nominations for delegates to the American Bar Association are now in order.

HON. J. G. HOLMES: I nominate Hon. Robert H. Powell as a delegate.

(The motion was duly seconded.)

PRESIDENT CURRIE: Are there any other nominations? We generally elect two delegates.

JUDGE GARLAND LYELL: I nominate your genial self. Unless as outgoing president you are an ex-officio delegate, I nominate you.

(The motion was duly seconded.)

JUDGE D. W. HOUSTON: Mr. President, pardon me, but there is an error. There are three delegates and three alternates.

PRESIDENT CURRIE: Are there any other nominations?

JUDGE GARLAND LYELL: I nominated Mr. George W. Currie.

JUDGE D. W. HOUSTON: I second the nomination and move that nominations be closed. All in favor of Mr. Currie's nomination say AYE; opposed, NO. He is elected as delegate to the American Bar Association.

PRESIDENT CURRIE: I thank you, gentlemen. We only have one other nomination.

HON. R. H. POWELL: I nominate Judge Garland Lyell.

JUDGE HOUSTON: Second the motion and move that nominations be closed.

PRESIDENT CURRIE: We will now vote on election of Mr. R. H. Powell and Judge G. Garland Lyell as delegates to the American Bar Association. Those favoring their election will say AYE; opposed, if any, NO. They are unanimously elected.

Next will be nominations for alternates—three alternates.

HON. W. S. WELCH: I nominate Hon. W. W. Venable.

(The nomination was duly seconded.)

JUDGE D. W. HOUSTON: I nominate Hon. J. W. Cutrer.

(The nomination was duly seconded.)

HON. J. W. DULANEY: I nominate Herbert H. Holmes.

(The nomination was duly seconded.)

JUDGE D. W. HOUSTON: I move that nominations be closed.

(The motion was duly seconded.)

PRESIDENT CURRIE: All in favor of the motion will say AYE; opposed, NO.

JUDGE D. W. HOUSTON: Mr. President, and members and ladies and gentlemen of the Association.

I feel that we would be derelict, would run counter to the feeling of all of the members of this Association if we did not by resolution return our most grateful thanks and warm acknowledgment to the members of the bar and the people of Clarksdale for their hospitality and cordial entertainment while we have been with them. While, of course, it is too early in the year for them to offer us corn on the ear or on the cob, still in other forms and in other ways it has been here or hereabouts, and that only in addition to other unusual courtesies and kindnesses that have been extended us, and, therefore, I desire to offer this resolution:

Be it resolved that the warm and cordial thanks of the members of this Association be and they hereby are extended to the members of the Bar and to the people of Clarksdale for their splendid hospitality and cordiality, and assure them that we are deeply appreciative.

I move the adoption of this resolution.

SECRETARY JIGGITTS: I second the motion.

PRESIDENT CURRIE: Is there discussion? Those favoring the resolution will say AYE; opposed, if any, NO. The motion is carried and the resolution is unanimously adopted.

The next in order will be selection of our next place of meeting.

JUDGE McINTYRE: Mr. President, at the convention last year at Gulfport, as I understand, it was practically agreed by this Association that we would hold our next meeting at the University of Mississippi, as by that time the new Law building will have been completed and the Association will be called upon to dedicate the building. It has been the dream of a great many members of this Association to have a first class Law building, and the representative of the Association of the American Law School has pronounced this one of the best, if not the best, law building in the South or in the nation. The Chancellor of the University insists that we hold our Association there next year, as do all the organizations of the city of Oxford. I am, therefore, placing in nomination for the holding of our next meeting, the University of Mississippi.

HON. H. A. SHOTTS: I second the nomination.

JUDGE ARMISTEAD: I move that nominations be now closed, and that the Secretary cast one vote for all for Oxford as our next place of meeting.

PRESIDENT CURRIE: Is there discussion? If not, those in favor of the motion will say AYE; those opposed, if any, NO. The motion is unanimously carried, and the Secretary will cast one vote for the University of Mississippi as our next place of meeting.

SECRETARY JIGGITTS: Mr. President, and members of the State Bar Association, I take great pleasure in casting one vote for all for the University of Mississippi and Oxford as the next convention city for the meeting of this Association.

PRESIDENT CURRIE: I officially declare that Oxford and the University of Mississippi have been unanimously selected as the next place of meeting.

We have arrived at sundry and miscellaneous business. Is there any miscellaneous or unfinished business?

JUDGE KIMBROUGH: Mr. President, I am sure that every member of this Association was very much impressed

with the splendid speech that was made here this morning touching our Department of Justice. I have given some thought to this question myself. I have been very much interested in it. You will find in the Mississippi Law Journal in the April issue an article written by me dealing with this very question. I think it is important for us now as a Bar Association to begin to consider the question, and I am going to move now at this time that a committee of twelve distinguished lawyers of this State, composed of three from each judicial district, and three from the State at large, be appointed by the President of the Association to study this question for the next twelve months as to whether it is advisable or practical for us in this State to ask the Legislature to set up or create a judicial commission or rule making commission in order that we may be enabled to work out some of the problems that were so ably discussed this morning, and I make that motion now.

(The motion was duly seconded.)

PRESIDENT CURRIE: Is there discussion? Those favoring the motion will say AYE; those opposed, if any, NO. The motion is carried.

Is there any other miscellaneous or unfinished business?

HON. A. W. DENT: I have a resolution I would like to introduce, reading as follows:

RESOLVED, That the Secretary of the Mississippi State Bar Association be and is hereby authorized and is empowered to make application to the American National Insurance Company of Galveston, Texas, for a Group Life Insurance Policy on the membership of the Mississippi State Bar Association, ages 18 to 65 inclusive, to be issued on the Annual Renewable term basis.

Provided, however, that this policy shall not be issued or become binding until at least 75 per cent of the eligible membership of the Mississippi State Bar Association, ages 18 to 65 inclusive, have signified their desire by subscribing for said insurance. Be it further

RESOLVED, That said Secretary is to incur no liability on the part of this Association as a whole or its membership individually, but each member subscribe and pay for his own Group Insurance.

HON. A. W. DENT: I take it for granted, gentlemen, that that resolution speaks for itself, that you get insurance up to $3,000 without any examination, from 18 to 65. You can not do it except it is under the group, so I am advised. The State Teachers Association takes this insurance, and also the Medical Association, I am advised. I do not state that as a fact. I have been asked to introduce that resolution here. It does not put any liability on anybody. You can not get this insurance unless it comes in a group. I submit the resolution.

JUDGE ARMISTEAD: I want to ask you a question. Does your resolution require each and every member to take out insurance, or the Bar Association to carry it for him?

HON. A. W. DENT: Each man is responsible for his own.

HON. W. S. WELCH: I make a motion that the matter be referred to the Executive Committee to report back at the next meeting.

(The motion was duly seconded.)

HON. A. W. DENT: We will accept that.

PRESIDENT CURRIE: Motion has been made and seconded that the resolution be referred to the Executive Committee for report at the next meeting. Is there discussion? Those favoring the motion will say AYE; opposed, NO. The motion is carried.

HON. T. L. HAMON: Mr. President, I don't want to take up much time or add to the cost of this meeting, but there is one thing I would like to suggest, and I will have to ask for a little information first from some of the members who have attended these meetings. I have been a member of the Association for 15 or 20 years, I don't know how long, but I never have attended one before. I am speaking now from the point of the country lawyer. I would like to ask for information. Is this about the sized crowd that usually attends these meetings?

PRESIDENT CURRIE: Practically, yes, sir.

HON. T. L. HAMON: Well, I take it that this is say 15 per cent of the lawyers of the State of Mississippi.

PRESIDENT CURRIE: There are about 1100 lawyers in Mississippi. I am not quite sure how many registered—about 200, about 20 per cent.

HON. T. L. HAMON: Following Judge Cook's suggestion yesterday, and following the speech of today, and the discussion of matters here this afternoon, if those things are really of importance, we ought to have 100 per cent of the attendance of the State Bar Association. I thought I was about the only lawyer in the State who stayed at home and felt safe in permitting experienced lawyers to look after those things. I find here you say about 15 per cent, or something like that, is the usual attendance. If you want the country lawyer to come here, I suggest that full time on these important discussions be given, without consideration

of cost, and that you eliminate, as suggested by Judge Cook, the entertainment features somewhat, and let them come here to mingle with each other and let them feel that they are welcomed to discuss all of these things that are of so much importance to them. I think you need the entire Bar in the organization. And if you work that out ———

PRESIDENT CURRIE: Do you make a motion?

HON. T. L. HAMON: No, sir, just a suggestion made for consideration later.

HON. H. A. SHOTTS: I now move that we adjourn, and that the program be announced by the President for this afternoon.

(The motion was duly seconded.)

PRESIDENT CURRIE: It has been moved and seconded that we adjourn. Those in favor will say AYE; opposed, NO. The motion to adjourn is carried, and the Association stands adjourned.

NOTICE TO THE MEMBERS OF THE MISSISSIPPI BAR

Beginning with the November, 1929 issue of the Law Journal, there will be an Open Forum section to which members of the Bar are invited to contribute.

It is not the purpose of the Journal to publish articles engendered by prejudice, or that otherwise might be hurtful to the profession but only thoughtful articles dealing with topics or subjects in which the profession, as a whole, in the State is interested.

If the article would tend to be hurtful it will not be published.

Constructive articles dealing with live questions of law coming from the courts of the State, or other sources, are invited. In fact anything for the good of the profession.

This forum is open to every lawyer in the State. No one need, therefore, have any hesitancy, if you have in mind a subject you wish to write about, preparing and mailing it to Mr. Ed White, Editor of the Mississippi Law Journal, University, Mississippi.

This is your forum. Give us some live contributions.

T. C. KIMBROUGH,
Chairman Bar Committee, Mississippi Law Journal.

NOTE FROM THE EDITOR

The one big desire of the Editorial Board of the Mississippi Law Journal is that each issue be eagerly read *with profit* by the entire Mississippi Bar, and in order that this desire might be realized the following are submitted as being some of the large number of leading articles which will appear through the issues of Volume II:

"A Construction of the New Corporation Act."

"The Bond Validation Act."

"Problems of the Bench and Bar."

"State Regulation of Banking by Guaranty of Deposits."

"Mississippi's Odd and Confused Statute."

"Justice for Public or Lawyers?", an answer to Justice Ethridge's article, "Unjust Standards for Law Practice."

"A Compilation of Mississippi's Automobile Law."

"The Extent to Which the State Railroad Commission May Regulate and Control the Operation of Busses."

"Mississippi's Prima Facie Statute."

"The Public Utility in Mississippi."

Conflicts which have arisen, recently, together with those which already existed, demand a change in the months of issuance of the Journal. Hereafter, the Journal will make its appearance on the first day of each of the following months: August, November, February, and May.

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Wright, Donald, Greenwood

Yeager, John A., Lumberton
Yerger, E. M., Clarksdale
Young, M. C., Aberdeen

CONSTITUTION

Name

Article I. The name of this Association shall be the Mississippi State Bar Association.

Objects

Art. II. The objects of the Association are to foster legal science, maintain the honor and dignity of the profession of law, to cultivate professional ethics and social intercourse among its members, and to promote improvements in the law and the modes of its administration.

Election of Members

Art. III. Petitions for membership in this Association shall be endorsed by two members thereof, and shall first be considered by the Executive Committee, which committee shall report its recommendation thereon to the Association at its annual meeting, to be held next thereafter. A favorable report by this committee shall entitle a person to membership without ballot, unless a ballot on such report is demanded by some member of the association, and, upon such ballot, five negative votes shall be sufficient to defeat any election for membership.

Membership

Art. IV. Any person shall be eligible to membership in this Association who shall be a member of the Bar of this State, in good standing, and who shall also be nominated as herein provided.

Officers

Art. V. The officers of this Association shall consist of one President, one Vice-President, a Secretary and Treasurer, and an Executive Committee, which Executive Committee shall be constituted as hereinafter provided. Each of these officers shall be elected at each annual meeting for the next ensuing year, but the same person shall not be elected for President for two years in succession. All such elections shall be held by ballot. The Secretary and Treasurer shall be elected by the Executive Committee. The officers elected shall hold office until their successors are elected and qualified according to the Constitution and By-Laws.

Executive Committee

Art. VI. The Executive Committee shall consist of five members, consisting of the President, who shall be ex-officio chairman thereof, the Vice-President, and one member to be elected at large from each Supreme Court District as now constituted, and shall discharge such duties as shall be imposed upon it by the By-Laws. It may be called together by the President or by any three members thereof.

Election of Members

Art. VII. All members of this Convention enrolling themselves and all others who have requested their enrollment, and all persons elected as herein provided, shall become members of the Association upon the payment of the admission fee as herein provided for. But after the adjournment of this Convention all nominations for membership shall be made as herein provided.

Annual Dues

Art. VIII. Each member shall pay to the Treasurer as annual dues, such sum as may be prescribed by the By-Laws, and no person shall be qualified to exercise any privileges of membership who is in default. Such dues shall be payable, and the payment thereof enforced, as may be provided by the By-Laws. Members shall be entitled to receive all publications of the Association free of charge. The admission fee shall be such sum as may be prescribed by the By-Laws, to be paid as the member is elected. The admission fee shall be in lieu of all dues for the first year.

Adoption and Amendment of By-Laws

Art. IX. By-Laws may be adopted or amended at any annual meeting of the Association by a majority of the members present.

Committees

Art. X. The following committees shall be annually appointed by the President for the year ensuing and shall consist of five members each:

1. On Jurisprudence and Law Reform.
2. On Judicial Administration and Remedial Procedure.
3. On Legal Education and Admission to the Bar.
4. On Obituaries and Memorials.
5. On Grievances.
6. On Professional Ethics.
7. Legislative Committee.

And such other committees as may be determined at any meeting.

A majority of those members of any committee who may be present at any meeting of such committee, shall constitute a quorum for the purpose of such meeting. Vacancies in any office provided for by the Constitution shall be filled by the President, and the appointee shall hold office until the next meeting of the Association.

Meeting of the Association

Art. XI. The Association shall meet annually at such time and place as it may select, and fifty members present at such meeting shall constitute a quorum. The Secretary shall give sixty days' notice of time and place of such meeting, either by publication in a public newspaper or by personal communication.

Duties of the President

Art. XII. The President shall preside at all meetings of the Association, and shall open each annual meeting with an address, in which he shall communicate the most noteworthy changes in the statute law, on points of general interest, made in the State and by Congress during the preceding year, or he may speak upon such matters of current interest as he may deem of value to the Association. Should the office of President become vacant by death, resignation or otherwise, the Vice-President shall possess the powers and discharge the duties of such office.

Alterations or Amendments of the Constitution

Art. XIII. This Constitution may be altered or amended by vote of three-fourths of the members present at any annual meeting, but no such change shall be made at any meeting at which less than fifty members are present.

Suspension of Members

Art. XIV. Any member of the Association may be suspended or expelled for misconduct in his relations to his Association or in his profession, on conviction thereof, in such manner as may be prescribed by the By-Laws.

Affiliation Plan

Art. XV. A Local or County Bar Association in Mississippi may become affiliated with the Association on certification to the Secretary of this Association by its officers that such Local or County Association has voted to affiliate itself with this Association pursuant to the Constitution of this Association, and acceptance of such Association by vote of the Executive Committee of this Association; and such affiliation shall continue until terminated either by vote of the Local or County Association or by vote of the Executive Committee of this Association. Each such affiliated Local or County Association shall certify annually to the Secretary of this Association any change in its membership, and pay to this Association an annual fee for each member of said Local or County Association at the rate from time to time provided by or pursuant to the terms of the Constitution or By-Laws of this Association; and all such affiliated associations shall co-operate with each other and with this Association and their and its respective committees in carrying out the objects of this Association.

No member of the bar of any city, town or village, or county, in which there shall be at the time such an affiliated association, shall hereafter be eligible to membership in this Association except as a member of such Local or County Association; and the termination of the membership of any member in any such affiliated association shall ipso facto terminate his membership in this Association. In case of the termination of affiliation of any such Local or County Association with this Association, all members of the affiliated association so desiring may remain members of this Association by paying the regular dues at the rate from time to time provided by the Constitution or By-Laws of this State Association.

BY-LAWS

I. President

The President shall preside at all meetings of the Association, and in case of absence, the Vice-President shall preside.

II. Secretary and Treasurer

The Secretary and Treasurer shall keep a record of all meetings of the Association, and of all other matters of which record shall be deemed advisable by the Association and shall conduct the correspondence of the Association, with the concurrence of the President. He shall notify the officers and members of their election, and shall keep a roll of the members and shall issue notices of all meetings; and shall collect, and, under the direction of the Executive Committee, disburse all funds of the Association. He shall report annually, and oftener is required; he shall keep regular accounts, which shall be at all times open to the inspection of the members of the Association. His accounts shall be audited by the Executive Committee. Before discharging any of the duties of this office, the incumbent shall execute a bond with good and sufficient surety, to be approved by the President, payable to the President and his successors in office in the sum of two thousand ($2,000.00) dollars, for the use of the Association and conditioned that he will well and faithfully perform the duties of his office so long as he discharges any of the duties thereof.

III. Executive Committee

The Executive Committee shall have power to make such regulations, not inconsistent with the Constitution and By-Laws, as shall be necessary for the protection of the property of the Association, and for the preservation of good order and conduct of its affairs. It shall keep a record of its proceedings. It shall direct the manner and the purposes for which all funds of the Association shall be disbursed, but it shall have no power to make the Association liable for any debts amounting to more than the amount in the treasury at any one time not subject to prior liabilities. It shall have the power to change the time and place for the holding of any annual meeting of the Association when, in its judgment, it is necessary or proper to do so. It shall select some person to make an address at each annual meeting, and not exceeding three members of the Association to read papers.

IV. Order of Business

At each annual, stated or adjourned meeting of the Association, the order of business shall be as follows:

1. Reading of Minutes of preceding meeting.
2. Address of President.
3. Report of the Secretary and Treasurer.
4. Report of Executive Committee.
5. Election, if any, to Membership.
6. Report of Standing Committees.
7. Report of Special Committees.
8. Report of Miscellaneous Committees.
9. Miscellaneous Business.
10. Election of Delegates to American Bar Association.
11. Election of Officers.

The election of officers shall be held on the morning of the second day of the session.

The order of business may be changed by a vote of the majority of the members present.

No person in discussion shall occupy more than ten minutes at a time, nor be heard more than twice on the same subject.

The parliamentary rules and order contained in Robert's Rules of Order, except otherwise herein provided, shall govern all meetings of the Association.

V. Members Elect

Any person elected to membership who shall fail to pay his admission fee within one month after notice of his election shall be deemed to have declined to become a member.

VI. Committees

In pursuance of Article X of the Constitution, there shall be the following standing committees:

1. A Committee on Jurisprudence and Law Reform, who shall be charged with the duty of attention to all proposed changes in the law, and of recommending such as, in their opinion, may be entitled to favorable consideration of the Association.

2. A Committee on Judicial Administration and Remedial Procedure, who shall be charged with the duty of the observation of the workings of our judicial system, the collection of information, the entertaining and examination of projects for a change of reform in the system, and of recommending from time to time to the Association such action as they deem expedient.

3. A Committee on Legal Education and Admission to the Bar, who shall be charged with the duty of examining and reporting what change it is expedient to propose in the system and mode of legal education, and of admission to the practice of the profession in the State of Mississippi.

4. A Committee on Obituaries and Memorials, who shall present suitable resolutions in memory of members who have died during the preceding year.

5. A Committee on Grievances, who shall be charged with the hearing of all complaints which may be made in matters affecting the interests of the legal profession and the practice of law and the administration of justice, and to report same to this Association with such recommendations as they may deem advisable; and said committee shall, in behalf of the Association, institute and carry on such proceedings against offenders, and to such extent as the Association may order, the cost of the proceedings to be paid by the Treasurer on the warrant of the Executive Committee out of any moneys subject to be appropriated by them.

6. A Committee to consist of five members and known as the Committee on Professional Ethics, who shall be charged with the duty of answering in writing all questions relating to the ethics of the legal profession submitted to them in writing by any member of this Association, that, in their judgment, ought to be answered, reporting to the Association all questions submitted to and answered by them, together with their answers thereto. Any question answered by them, together with their answer thereto, may be made public by them at any time they see fit.

7. A Committee to be composed of five members, of which the President shall be ex-officio member, whose duty it shall be to appear before the Legislature at each session thereof, at the expense of this Association, there to present and urge upon the Legislature the desirability of enacting into law such suggestions.

VII. Appointment

Each of the standing committees shall consist of five members, and shall be appointed annually by the President of the Association, and shall continue in office until the annual meeting of the Association next after their appointment and until their successors are appointed, with power to adopt rules for their own government, not inconsistent with the character, Consti-

tion or these By-Laws. Any standing committee of the Association may, by rule, provide that three successive absences from the meetings of the committee, unexcused, shall be deemed a resignation by the member so absent from his place upon the committee. Any standing committee of the Association may, by rule, impose upon its members a fine for non-attendance, and may provide for the disposition of the fines collected under such rules.

All reports of standing and special committees shall be filed with the Secretary, in writing, not less than thirty days before the annual meeting of the Association.

VIII. Charges Against Members

Whenever any complaint shall be preferred against a member of the Association for misconduct in his relations to this Association, the member or members preferring such complaint shall present it to the Committee on Grievances, in writing, and subscribed by him or them, plainly stating the matter complained of, with particulars of time, place and circumstances. The committee shall carefully examine and consider the same after giving reasonable notice to the party against whom the complaint is made of the time and place of hearing, and shall report to the Association at the next annual meeting, recommending what action it should take in the premises.

IX. Charges Against Lawyers and Judges

All complaints which may be preferred against lawyers or judges, affecting their professional or official conduct shall be inquired into and examined by the Committee on Grievances, on behalf of the Association, in such manner as may be authorized and prescribed by the laws of the State.

X. Nominations and Elections

Nominations of candidates to fill the respective offices, except the office Secretary and Treasurer, may be made at the time of election by any member, and as many candidates may be nominated for each office as members may wish to name, but all elections, whether to office or membership, must be by ballot. A majority of the votes cast shall be sufficient to elect to office, but five negative votes shall be sufficient to defeat an election to membership.

XI. Supplying Vacancies

All vacancies in an office or committee of this Association shall be filled by appointment of the President and the persons thus appointed shall hold for the unexpired term of his predecessor; but if a vacancy in the office of President, it shall be filled by the Association at its first stated meeting occurring more than ten days after the happening of such vacancy, and the person elected shall hold for the unexpired term of his predecessor.

XII. Annual Dues

Each member shall pay to the Secretary and Treasurer of the Association the sum of five dollars annual dues, and an admission fee of five dollars shall be paid to the Secretary and Treasurer as the member is elected. All annual dues shall be paid on or before the first day of March in each year, and any member failing to pay his annual dues by that time shall be in default, provided ten days' notice thereof shall have been given him by the Secretary and Treasurer; and thereupon the Executive Committee may, without further notice, cause the name of such member to be stricken from the roll for non-payment of dues, and his membership, and all rights in respect thereto will thereupon cease. A member who has been dropped from the roll for non-payment of dues may be restored to membership by the Executive Committee upon the payment of such back dues as the committee shall think equitable.

XIII. Amendment of By-Laws

These By-Laws may be amended at any stated, adjourned or annual meeting of the Association by a majority of those present.

XIV. Resignation of Officers and Members

Any officer may resign at any time upon settling his accounts with the Association. A member may resign at any time upon the payment of all dues to the Association, and from the date of the receipt by the Secretary and Treasurer of a notice of resignation, provided that all dues have been paid, the person giving such notice shall cease to be a member of the Association.

XV. Salary of Secretary and Treasurer

The annual salary of the Secretary and Treasurer shall be three hundred dollars, one-half of which shall be due on the first day of May, and the other half on the first day of November in each year, but may be paid earlier, or at earlier times if the Executive Committee shall, in writing, so direct; but this shall be in full of all compensation to him. No other officer of the Association shall receive any salary or compensation.

XVI. Special Meetings

If the President and Executive Committee shall determine that it is necessary for the Association to hold any other meeting during the year than the regular annual meeting, the same shall be held at such time and place as the President and Executive Committee may fix, upon twenty days' notice of such time and place, to be given by the Secretary and Treasurer by publication in a newspaper and notice thereof to each member; and the Secretary and Treasurer shall give this notice upon order of the President.

XVII. Honorary Members

All judges of the Supreme, Circuit and Chancery Courts of this State and the United States Judge for the two districts of this State are honorary members of this Association, and they are relieved from the payment of admission fees and dues.

XVIII. Certificate of Membership

A certificate of membership shall be issued to each member of this Association upon his election and payment of initiation fee, which certificate shall be signed by the President and Secretary.

XIX. Annual Meetings

The annual meeting of the Association shall be held on the first Wednesday after the last Monday of April of each year, and the ladies constituting part of the family of members are invited to attend all proceedings, including the banquet.

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THE NEW INTERNATIONAL LAW[1]

By James W. Garner *

While the system of international law which has been gradually built up during the past 300 years may justly be regarded as one of the highest manifestations of modern civilization and one of its most notable achievements, we are obliged to confess that the role which it has played in the international life of the world has been somewhat disappointing. This is due, in part, to the fact that the development of international law has not kept pace with the growth of international relations and, in part, to certain defects or weaknesses, inherent or otherwise, in the system of international law itself. If we compare the development of international law with the development of the municipal law of a typical modern state we shall be struck by the fact that the former has not grown and expanded to meet the new and ever changing conditions of international life in the same degree in which municipal law has developed and expanded, as the conditions of local and national society have made it desirable or necessary. What an English judge recently said of the common law of his own country, namely, that it must "grow with the development of the nation; it must face and deal with changing or novel circumstances; unless it does that it fails in its function and declines in its dignity and value;" and that "an expanding society requires an expanding common law"—may be said with equal truth of international law. As everyone knows, international society during the last century has undergone a remarkable transformation, largely in consequence of in-

1 An address delivered at the Universities of Lyons, Strasbourg, Wales and Manchester in 1929.

* James W. Garner, born in Pike County, Mississippi, and a graduate of the Mississippi A. and M. College, has been professor of political science in the University of Illinois since 1904. He is the author of various books on history, political science, and international law. He was Harvard-Hyde lecturer in the French universities in 1921; Tagore professor in the University of Calcutta, India, in 1921-22; lecturer at The Hague in 1923; Stokes

dustrial development, the invention and perfection of new agencies of communication and transportation, increasing intercourse among the peoples of different parts of the world and the growth of a consciousness of interdependence and solidarity of interests, which ignores or defies the barriers of distance and of national frontiers. One result of this remarkable transformation is that there exists today a vast domain of relationships which although once local or national have become international in their scope and effect. While the common interests of the international community require that they should be internationally regulated and brought under the aegis of international law, in fact many of them have not been so regulated at all or only inadequately regulated. In this respect the progress of international law has lagged behind the development of international relations and, as I have said, has not kept pace with the expansion of the municipal law of particular states. There are various reasons for this, some of which I may mention without discussion. They are: (1) the exaggerated feeling of nationalism which has always stood in the way of the progress of internationalism whether the latter manifests itself in the form of law, organization or co-operation; (2) the persistence of the legal theory of absolutely national sovereignty, and the disinclination or unwillingness of states to accept the restrictions upon that sovereignty, which the extension of the empire of international law necessarily involves; (3) the like persistence of the legal theory of the equality of states and its baneful effect upon the progress of international organization and legislation; (4) finally, the practical difficulties inherent in the process of international legislation, that is, of reaching agreements acceptable to the whole body of states.

There is one other circumstance which I venture to suggest as a reason why the most important part of international law, namely the part which deals with the relations of states in the normal times of peace, has, relatively speaking, made so little progress. I refer to the fact that prior to the world war at least, the principal preoccupation of international jurists and statesmen so far as the development of international law is concerned, was the effort to build up a system of law, so called, for the regulation of

lecturer at New York University in 1926; professor in the Institute of Higher International Studies at Geneva, Switzerland, in 1928-29; and Carnegie visiting professor to various English and French universities in 1929. He has received the honorary degree of doctor of laws from the Universities of Calcutta in India, Lyons in France, and Oberlin in the United States. He was decorated with the French Legion of Honor in 1926.

the conduct of war, with the result that the other and far more important part of international law, the law of peace, was in large measure neglected. Prior to the world war most of the important international conferences convoked for the purpose of making international law or for advancing the cause of the general peace, confined their efforts, in the main, to the formulation of rules for the conduct of war. In this connection it will be recalled that of the three declarations and thirteen conventions formulated by the Second Peace Conference at the Hague, only two related primarily to the peaceful relations of states. The others represented an attempt to lay down rules under which war might be legitimately carried on, the treatment of prisoners, the capture and destruction of property, etc. "The spectacle," says Sir John Fischer Williams, a distinguished English jurist, "of two successive international world 'peace' conferences at the Hague, engaged in the production of two conventions for diminishing, and eleven conventions for regulating, war, if it arouses the impatience of pacificists, provokes, what is perhaps more serious, the amused contempt of the ordinary man." He very pertinently asks, "How can we defend a conception of international law which puts rules for the conduct of a process destructive of civilization, on a par with the rules for the organization of the civilized relations of states? The function of international law is not to spend half its time as a despised and ineffective referee at a peculiarly bloody form of gladiatorial contest—a contest, indeed, in which the distinction between spectators and gladiators has become very thin."

Whether customary and conventional rules for the regulation of the conduct of war may properly be classified as a part of international law, and if so, whether their practical utility is worth the effort that has been put forth to bring them into existence and to secure their general adoption, I have no time here to discuss. Jurists are not lacking who deny both propositions. Law and war, they maintain, are mutually contradictory conceptions; war is a negation of law and rules purporting to prescribe how it may be legitimately prosecuted do not possess either the dignity or the character of law. Moreover, they argue, the effort to regulate the conduct of war is largely futile since in the stress of conflict the rules will be disregarded by belligerents whenever a strategic interest can be subserved thereby. While I do not entirely share either of these extreme opinions, I deplore the disposition to place the so-called

law of war on an equal footing with the law governing the relation of states in time of peace, to bestow equal dignity upon them and to devote an equal amount of space to them in the treatises on international law. The "man in the street" usually identifies them and when the former are violated in the clash of arms the whole system of international law is discredited and brought into disrepute by undiscriminating critics who do not distinguish between the two. I venture the opinion that jurists, statesmen, text writers, and international conferences in the past have devoted an undue proportion of their time and thought to the building up of a body of international law for the regulation of war in the effort to humanize and civilize it and too little to the development and perfection of the law for the regulation of the peaceful and normal relations of states. The time has arrived, it seems to me, when those upon whom the responsibility for the further development of international law rests, should devote their attention and effort in far larger degree than in the past to the building up of a system of law for the prevention of war, through the perfection of pacific processes for the settlement of international controversies and to the reaching of general agreements among the nations to have recourse to these processes as a substitute for war. There is much evidence that this opinion as to the nature of the task of the future is finding an increasing number of partisans.

Unfortunately, international law in its present state possesses certain defects and weaknesses, some of which are capable of being removed while others can at least be attenuated. In the first place, as I have already indicated, the empire of the old international law was and is still too narrowly circumscribed. As a result of various causes, the world has now acquired the character of a vast and delicate organism, it has become a veritable network of relationships of almost infinite variety; its parts are mutually interdependent each upon the others and all possess numerous common interests which can be advanced and protected only through common organization, joint co-operation, and the instrumentality of a common law. While an increasing number of these interests and relationships have become the subject of conventional legislation or are governed by generally recognized customary rules of international law, there is still, as I have said, a large domain of international relations which is unregulated either by customary or conventional international law. This area may be called the dark continent of international society, waiting to be ex-

plored and brought under the protecting aegis of international law. One of the tasks of the future, therefore, will be the extension of the empire of international law over this domain.

There is a second category of interests or relations concerning which, although regulated by international law, there exist divergences of opinion as to precisely what the law requires or forbids, and this constitutes one of the weaknesses of the system of international law as it exists today. It is a defect not peculiar to international law; it exists in all systems of municipal law. But in municipal law there are permanently established tribunals for interpreting the law and for deciding finally disputes which arise as to its meaning. Until the recent establishment of the permanent Court of International Justice, there were no international tribunals permanently organized and always in existence to which recourse could be had by states for the decision of their disputes arising out of conflicting interpretations of the rules of international law. Under these circumstances disputing states which were willing to settle their controversies by judicial process were obliged to organize an *ad hoc* tribunal which ceased to exist and became *functus officio* as soon as it had rendered a decision in the particular controversy. The establishment of the Permanent Court of International Justice has ameliorated this regrettable situation to some extent, but so long as its competence is, in the main, voluntary, and states are not obliged to submit to its decision disputes concerning the interpretation of international law, the role which the court will be able to play in the development of international law will be only a secondary one. The acceptance by 43 nations of the optional clause of the statute of the Court under which they are bound to submit to it all disputes concerning questions of international law and the interpretation of treaties is a distinct step in advance.

Another defect of the old international law, and it still exists, was the lack of suitable organs for making new rules of international law and for altering or abrogating existing rules. In this respect as in others, the development of international law has lagged far behind the development of municipal law. In the constitution of every state one of the essential organs provided for is a law-making body or authority; but as yet, there is no corresponding organ for the society of states. As the necessity for new rules of international law has become urgent from time to time it has been met in some degree by specially convoked inter-

national conferences composed of diplomatic representatives acting upon the instructions of their government. Legislation by such conferences was an extremely difficult process and the results were often unsatisfactory and disappointing. Many persons once hoped that the so-called Hague Peace Conferences of 1899 and 1907 would develop into something analogous to a world parliament meeting at regular intervals to formulate new rules of international law or to alter the old rules, as necessity required. But they were doomed to disappointment. There is some prospect that the Council and Assembly of the League of Nations may ultimately develop into organs having some of the characteristics of a legislative assembly. In fact, the League is already playing an important law making role. By means of the numerous conventions, nearly 50 altogether, which have been formulated by the assembly or by special conferences called by the League, many of which have been ratified by all or a large majority of states, the League has become the most important of the existing sources of international law today. In no previous period in the history of the world has there been such a large addition to conventional international law as has been made since the establishment of the League.

We pass now to another criticism of the existing system of international law, namely, that it lacks effective sanctions by which its prescriptions can be enforced. As everyone knows, this is one of the principal differences between international law and municipal law. For the enforcement of municipal law there are executive and judicial organs established by the state for arresting and constraining violators of the law and for punishing those found guilty of infractions. In this way observance of the law by individuals who are bound by it, may be compelled under pain of punishment. But as yet there is no such machinery for the enforcement of the rules of international law. Consequently, we are told by some critics, international law will never be anything more than international comity or etiquette until adequate means are found for enforcing upon states observance of its prohibitions and commands in the same way that compliance with the prescriptions of municipal law may be enforced upon individuals.

For several reasons I do not share this view of the ineffectiveness of international law in its present state of development. In the first place, those who indulge in this criticism overlook or ignore the fact that in reality international law does possess sanctions hardly less effective

than those of municipal law. Among these may be mentioned the power of reprisal, retaliation, non intercourse, pacific embargo or blockade and, as a last resort, war itself—remedies which are always available to a state which has suffered injury or is threatened with injury through the failure or refusal of another state to conform to the requirements of international law, and which in the case of a powerful state so injured or threatened with injury can usually be applied with success. Ordinarily, a state confronted with the prospect of being subjected to such measures will be deterred from disregarding or violating the law. Moreover, the reciprocal advantages which follow the mutual observance of the law by states in their relations with one another and the loss which usually results to one or the other from non-conformity constitute a powerful inducement to all to respect and obey the law.

Finally, there is the powerful influence of public opinion, which in the community constitutes the most effective sanction of municipal law, since with the vast majority of citizens in civilized society it is not so much the fear of possible punishment that deters them from violating the law as it is the unwillingness to incur the obloquy and reproach of their fellow citizens, such as usually follows individual conduct in violation of the law. Civilized states are no less affected by the powerful influence of public opinion and the more highly civilized they are the more sensitive they are to criticism that they have repudiated or disregarded the standards of conduct set by civilized society. Sir Henry Maine well remarked that while the founders of international law did not create sanctions for it, they did create a "law abiding sentiment," by which he meant to say that the disposition to observe the law resulted logically from an appreciation of its utility.

Mr. Elihu Root has well remarked that "the difference between municipal and international law, in respect of the existence of forces compelling obedience, is more apparent than real and that there are 'sanctions for the enforcement of international law, no less real and substantial than those which secure obedience to municipal law.' " These sanctions are found, as I have said, in the impulse of conformity to the standards of international conduct set by the general sentiment and practice of civilized states, the regard for what Thomas Jefferson called a "decent respect for the opinions of mankind" and the unwillingness of civilized peoples to suffer the reproach of having repudiated those standards. During the happy times of peace these sanc-

tions have generally been effective enough to insure observance of the law, and it is only during the stress and strain of war that they have sometimes failed. As John Bassett Moore has justly remarked, "on the whole, international law is as well obeyed today as is municipal law," and he adds: "perhaps one would not go too far in saying that it is better observed, at any rate in time of peace." It probably would not be going too far to predict that with the further development of international law and the increasing consciousness of its utility the disposition to obey it will proportionately increase, just as municipal law is more generally obeyed today than it was in its early stages of development.

Lord Birkenhead in an address before the Canadian Bar Association in September, 1923, declared that international law could never become real law until there had been created a power or force superior to that of any state capable of compelling by restraint or coercion members of the international family to observe its commands and prohibitions. I cannot bring myself to share this view—the Austinian conception—of international law. This conception rests on the erroneous notion that it is the sanction which creates the law and not the law which creates the sanction—a conception which is contradicted by the history of the development of the customary law of Lord Birkenhead's own country. I venture to believe that a more correct view was that expressed by Sir Henry Berkeley in the case of the *Prometheus* in 1905 where this distinguished jurist affirmed that a sanction, as ordinarily understood by lawyers, is not a necessary element of the law, that laws have frequently existed and been generally observed when there were no means of compelling observance and that in the case of international law, the lack of power to restrain or punish a violating state is no evidence that the law has no existence but evidence only, where it is violated, of the ability of the particular state to defy the law and perhaps to escape punishment.

I do not mean to conclude that more effective sanctions for the enforcement of international law are not desirable, especially in time of war when the temptation of states to overstep or even to flout the law when it stands in the way of their freedom of military action and during which period violations are most common. On the contrary, it is to be hoped that adequate sanctions, effective as those for the enforcement of municipal law may be devised and it may be confidently expected that the further development of international law will see the creation of such sanctions. This

is one of the most important as it is one of the most difficult tasks which confronts those upon whom will rest the responsibility for the future development of international law.

One final defect of the existing system of international law and one for which it has often been reproached is that it is not yet supreme over the municipal law of the particular states which form the family of nations. It is still international and not super or supra national law. According to the legal theory of all states, municipal legislation, especially when it is in the form of national statutes—and in the states of continental Europe generally, this is also true of executive decrees or ordinances—still takes precedence over the rules of international law, in the sense that national courts and executive functionaries are bound by the prescriptions of the municipal law of their states and are obliged to apply and enforce them even when they are contrary to the established rules and principles of international law. In short, their primary allegiance is to their national law and in case of conflict, between it and international law, the obligations of the latter must be disregarded and the former discharged. It should be said, however, that this is only the legal theory. While national courts and executive functionaries are bound primarily by the rules of their own municipal law and must give effect to them even when they are contrary to international law, it does not follow from this theory that a state is free to enact municipal legislation in contravention of international law. It is a well established principle that the international obligations and duties of states are not determined by their own municipal law but by the law of nations and no state may plead the existence of a municipal statute in defense of conduct in violation of an established rule or principle of international law. It may enact such legislation and compel its courts and executive functionaries to apply and enforce it, but it cannot oblige other states to admit its validity or respect it. The doctrine of international responsibility limits the power of states in this respect. The government of the United States has often declared that the observance of the rules of international law by states is one of the essential conditions of membership in the family of nations and that a state which repudiates or disregards those rules places itself outside the circle of civilized society. The attitude and practice of other states is the same. Under these circumstances it is a fair question to raise whether, therefore, municipal law is in any real sense su-

preme over international law. It amounts to little to admit that a state may enact municipal legislation in contravention of international law and oblige its courts and executive officials to give effect to it, when in the same breath such a state is told that if it does so it will be held responsible by other states for injuries resulting from such legislation and that by so doing it will forfeit its right to membership in the family of civilized states and to the other benefits of international law itself.

For these reasons, an increasing number of distinguished jurists and scholars, ignoring the legal theory and regarding the actual practice of states in their relations with one another, have affirmed that in fact international law today is supreme over municipal law and states are bound by its prescriptions. Among eminent jurists who now maintain this view may be mentioned Politis, Kunz, Kelsen, Krabbe, Kohler, Pillet, Keufmann, Nelson, von Bar, Le Fur, and others. If we disregard the legal theory and consider the actual facts of international life and the practice of states we shall find much to support this view.

Such are some of the features and some of the weaknesses of the old international law and some of them still exist. Certain of the defects mentioned are still serious but some of them, as I have endeavored to show, have been exaggerated. The law is now in the process of transformation and we may confidently predict that in the course of its future development some of these defects will disappear while the seriousness of others will be greatly reduced, somewhat as the early defects of municipal law have been removed or attenuated. I venture to assert that its main development will be along the following lines:

In the first place, and most important of all, perhaps, there will be a large extension of the empire of international law to cover the vast domain of international relationships now unregulated or only inadequately regulated, by international law. This achievement will constitute the larger part of the task of what is popularly called "codification" but which in reality is legislation. As is well known, the movement for codification is now well under way both in America and Europe. Draft projects of codes of public and private international law have recently been formulated by pan-American committees of jurists and twelve of these projects were approved by the 6th Pan-American Conference at Havana in January, 1928, and recommended to the governments of the 21 American Republics for ratification. In Europe the League of Nations has

taken the initiative by the appointment of a committee of experts to select a list of the questions of international law which in its opinion are ripe for codification, that is, questions upon which international agreement is most desirable and feasible. The committee after considering numerous suggestions decided to propose only three questions for codification: nationality, responsibility of states, and the extent of territorial waters. At its meeting in September, 1928, the Assembly of the League approved the report of the committee and declared itself in favor of the holding of an international conference during the year 1930 for the "codification" of international law on these three subjects. Restriction of the task to three questions only, represents a very modest beginning and in case the conference is able to reach agreements on them and the agreements are ratified by the whole body of states, only a very small part of a large task will have been achieved. It is well to remember, however, that the process of international codification is a very difficult one in comparison with the codification of national law and it must necessarily proceed slowly, gradually, and by piecemeal. The whole task cannot be performed at once; the preponderance of opinion among jurists is that it is wiser to begin with a few questions, endeavor to reach agreement upon these and if the effort is successful, extend the process from time to time to other questions upon which the desirability of agreement is most urgent.

In the meantime, the extension of the empire of international law is proceeding by another process, namely, through the conclusion of multilateral conventions, each dealing with some particular subject of international concern. Since the close of the world war a very large addition to the conventional law of nations has, as I have said, been made in this way. It includes 23 international conventions relating to labor questions, seven conventions on freedom of transit and communications, and conventions dealing with the white slave traffic, and the traffic in opium, obscene publications, commercial arbitration, the international regime of maritime ports, transmission of electric power, customs formalities, aerial navigation, the development of hydraulic power, and others are in process of conclusion. Some of these conventions have been ratified by nearly all the states of the world.

This rapid extension of the domain of international law over areas heretofore unregulated by international agreement constitutes the most important achievement yet made

in the development of international law and it may be confidently predicted that it will go forward in the future until ultimately the body of international law will embrace the larger part of the field of international relations. This achievement will have far reaching effects upon the relations between states. By supplying the body of positive international law where none existed before it will diminish the causes of conflicts and controversies and at the same time greatly facilitate recourse to pacific settlement of disputes which arise. So long as there were no definite rules of law by which international courts and arbitration tribunals were bound, there was less inclination among states to submit their controversies to the decision of such tribunals, for the reason that in such cases, the tribunal would in effect be obliged to make the law itself, before rendering a decision, and disputing states were unwilling to leave so important a function to them. As Mr. Root has well remarked, the lack of an adequate system of law to be applied by international tribunals, has been the chief obstacle to the development of a system of judicial settlement of international disputes. The creation of the Permanent Court of International Justice has not merely accentuated the necessity for the creation of a body of new law for the Court to apply where there is no existing law, otherwise disputing states will rarely be willing to entrust their controversies to it for decision. In short, the establishment of the Court and the creation of a body of law for it to apply in the decision of cases submitted to it are mutually necessary and correlative parts of the same task.

In the second place, we may, I think, expect to see in the future progress of international law far more emphasis on the development of the law of peace and less upon the so-called law of war. The new law of nations will be largely a body of law for the regulation of the pacific relations of states; it will provide methods and instrumentalities for the peaceable settlement of disputes; the processes of law and justice will displace those of force and violence and the necessity for a law of war will become correspondingly less and may ultimately disappear entirely.

The existing system of international law is sometimes criticized because it recognizes war as a permissible, if not a legal, remedy for international wrongs (torts), because, in the language of one of its critics, it "sanctifies" war by attempting to regulate it and by recognizing the legal validity of title to territory acquired by conquest. This criticism, however, is not altogether a just one. If international

law recognizes war it does so because it has no other alternative, because war is resorted to in practice by states, and until another substitute for it is found which states themselves are willing to adopt, international law cannot ignore it any more than the municipal law of a particular state can ignore the existence of crime in the community. To recognize war as a persistent fact and endeavor to regulate its conduct so as to reduce as far as possible its evils is not sanctifying it or recognizing it as a legal institution. On the contrary, it may now be said that so far as positive international law adopts any attitude at all toward war, at least aggressive war, it is an attitude of condemnation, as an international crime. It is not, therefore, international law itself which deserves to be criticized for recognizing war as a remedy for international wrongs, but the peoples of the world who tolerate war and resort to it in practice as a means for redressing their wrongs. There is one feature, however, of international law which may be justly criticized in this connection, namely, its failure to distinguish between the legal effects of war waged in defense of a just cause and one waged for the support of an unjust cause. Grotius and other founders of international law recognized such a distinction but it never gained a foothold in the system of law actually accepted and applied. As a result, the belligerent who engages in an unjust war enjoys exactly the same rights in his relations with neutrals, that a belligerent who wages a just war enjoys. That is to say, the neutral regards the cause of both belligerents as equally just, which is manifestly absurd. It is to be hoped that the new international law will recognize a distinction between the two kinds of wars and find a practicable criterion by which the one can be distinguished from the other. The Covenant of the League of Nations in fact distinguishes between wars undertaken in support of the objects of the League—wars which, therefore, may be regarded as "just," and those in violation of the Covenant, which may be regarded as "unjust," and it recognizes a distinction between the rights of the belligerents in the two cases. The distinction between defensive wars and wars of aggression or wars for the advancement of the national policy of the state waging it, now embodied in the Briand-Kellogg pact, represents the most far reaching step in this direction ever taken and seems destined to become an established principle of international law. There still remains, however, the necessity of an agreement among the nations upon a practicable test or criterion by which a defensive war can be distinguished

from a war of aggression. That such an agreement will be reached in the near future may be predicted with certainty.

In this connection I may refer to another change which it is to be hoped will find a place in the new international law, namely a new conception of neutrality in respect to flagrant violations of international law. The theory of the old international law was that whenever one state violated the law only the immediate victims of the breach had a right to take action against the violator; other states were regarded as strangers to the affair; it was a matter of no concern to them and their right even to protest against the breach of the law was not admitted. This was and is the theory of municipal civil law which treats torts as injuries only against the particular person injured and which leaves him alone to redress the wrong through recourse to the courts or otherwise. But this has never been the theory of the criminal law and it should not be a principle of international law. As everyone knows, it is a principle of the criminal law that a violation of that law, theft or robbery, for example, is regarded as an injury to every citizen of the state and the state will prosecute and punish the offender even though the particular victim of the offense may be content to allow the offender to go unpunished—this on the theory that the law which has been broken is the law of all the citizens and its violation in a particular case constitutes a wrong not merely against the person immediately injured thereby but against every citizen of the state.

The right of every state, therefore, not only to protest against the violation of international law but even to adopt appropriate measures to maintain the integrity of the law thus violated should be recognized. As Mr. Root very justly remarks, when a controversy arises between two states, other states are strangers to the dispute as to what the law requires in that particular controversy but they cannot really be strangers to a dispute as to whether the law applicable to the case shall be observed and applied. In the face of a flagrant contravention of an established rule of international law made for the protection of each and every member of the international community there is no duty of indifference or neutrality resting upon any state. President Wilson once declared that "no nation can any longer remain neutral as against any wilful disturber of the peace of the world." Again he said: "Neutrality is no longer feasible or desirable where the peace of the world and the freedom of its peoples are involved." And he added:

"We have seen the last of neutrality in such circumstances."

The late professor, Lammasch, an eminent Austrian jurist, thus described the right of a neutral *vis a vis* one who threatens to engage in an unjustifiable war: "Listen to me; I will try to settle your dispute. If you do not hear me, I will treat you as a disturber of the peace; I will regard your war as an unjustifiable one and that of your adversary as justifiable. I will hold you responsible for every damage committed against me or my nationals. I will not take part in the war on either side but I will allow my citizens to help your adversary by furnishing him money and supplies and I will not allow them to furnish you anything." It may be confidently predicted that this new attitude toward an aggressor will be sanctioned by the new international law. Indeed it has already been accepted by the members of the League of Nations. Under Article 16 of the Covenant, a war waged by one state against another member of the League in violation of the Covenant is declared to be a war against all the other members of the League who are bound to refrain from all intercourse, commerce, or financial relations with the Covenant breaking state. Under these circumstances the duty of non-intervention and neutrality disappears and the duty of concerted action against the offending state takes its place.

I venture to conclude my observations in summary form with the prophecy that the empire of the new international law will, in a much larger degree than at present, be co-existent with the domain of international relations; that consequently its general utility as an instrumentality of civilization will be correspondingly increased; that, in particular, by furnishing rules and principles upon which international tribunals will be obliged to base their decisions, it will increase the readiness of states to have recourse to such tribunals for the settlement of their disputes and thus contribute to the general peace, the observance of its commands and prohibitions will be better assured by more effective sanctions; it will deal in a much larger degree with the relations of states in time of peace and less with the conduct of war; it will make a sharp distinction between the rights of a state which is engaged in a just war and those of a state engaged in an unjust war; it will regard violations of the law by a particular state as an attack upon the rights of all states, this on the principle that international law is the law for the protection of the whole

society of states and that its subversion by a particular state destroys that protection.

As the law develops there will be more and more a shifting of emphasis from the rights of states to their duties; from the particular interests of states to the general social interests of the society of states; from individual to collective responsibility; from the rights of national sovereignty to international control; from independence to interdependence and co-operation, and ultimately the law governing the relations of states will tend to become less and less international and more and more supernational, so that its supremacy over municipal law will be fully recognized in legal theory. Henceforth national tribunals will be bound to give it their primary allegiance, apply always its rules and disregard all contravening prescriptions of their national law. This achievement will be one of the crowning triumphs of modern civilization.

THE NEW CORPORATION ACT

By W. G. Roberds *

The Legislature of 1928 passed a new corporation act. (Ch. 90, page 126, Laws of 1928). It will be considered from the standpoints of (1) Aims and purposes in the passage of the act, (2) meaning and arrangement of the act itself, (3) the act and related statutes, and (4) changes and additions which might be helpful.

(1) AIMS AND PURPOSES IN THE PASSAGE OF THE ACT: The main objects in the passage of the Act were: (a) speed in procuring charters, (b) to authorize and regulate the issuance of different classes of stock, including preferred and common and non-par stock, and (c) encouraging the creation of corporations in Mississippi, with resulting benefits from the increased revenue to the State.

The Act has largely effectuated these objects.

(a) Under the old law the application for the charter had to be published three weeks before being sent to the Secretary of State. Timing of publication, procuring proof of publication, with other usual incidental short delays, usually meant it took a month to get the application to the Secretary of State. The disadvantages of this delay were strikingly realized when it was necessary to procure a charter out of Mississippi to administer relief to flood sufferers of the Mississippi Valley. Now no prior publication is necessary; the application may be sent the Secretary of State immediately on being signed and acknowledged by the incorporators.

(b) Under the old law only stock having a specified par value could be issued. Under this Act different classes of stock may be issued, including non-par stock and different classes and series of preferred and common stock. The power of corporations to issue different classes of stock and series of each class is considered essential by the business world of today. The advantages and disadvantages of non-par stock will be later considered. The old law required twenty-five per cent of the stock to be paid before the corporation began business. Under the new Act the application should state the number of shares to be sub-

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scribed and paid for before commencing business, apparently giving discretion to the Governor to regulate this amount before approving the charter.

(c) That the passage of this Act has resulted in encouraging the creation of corporations in Mississippi may fairly be assumed from a comparison of the following figures, showing the number of charters and capitalization for the years 1927 and 1928 and 1929:

DOMESTIC

Year		Capitalization
1927	463	$ 20,429,100
1928	560	25,228,300
1929, to August 1	400	121,193,300

FOREIGN

1927	138	$586,908,250
1928	156	415,267,200
(13 of these were no par value stock)		
1929, to August 1	109	$395,071,900

If it be said that this increase is partly due to the increasing prosperity of and turning of industry to the South, it will be admitted; but it may be further said that, though feed be plentiful, ducks veer from the feeding grounds, if they see the huntsmen in the blind. Industry and capital need to be assured a fair deal.

(2) MEANING AND ARRANGEMENT OF THE ACT ITSELF: Some observations may properly be made as to the meaning and arrangement of the Act itself. All suggestions hereafter made are intended as constructive and not critical.

It provides, that "a copy of said instrument shall be published within thirty days after the charter is granted one time in one or more newspapers published in the county . . . ", etc. While the meaning seems apparent, the wording would be improved by inserting "one time" after "published," or it might read, "And a copy of said instrument shall be published one time within thirty days after the charter is granted, said publication to be in one or more newspapers published in the county where such corporation is domiciled, or if none be so published, then in one or more newspapers published in the state and having a circulation in such county."

Suppose the publication is not made. Is it a de facto corporation? The next sentence reads, "And the powers specified in such charter shall, by the approval of the charter, be vested in such corporation and it shall go into opera-

tion, after the number of shares designated in the charter of incorporation as necessary for the commencement of business shall have been subscribed and paid for either in cash or property, at the time and on the terms and conditions specified." The two provisions must be considered together. While the powers are *vested* on approval of the charter "and it shall go into operation, after the number of shares . . . " are paid for, yet if the publication is not made, what is the effect? It is thought if the publication is not made the corporation would be not a de jure but a de facto corporation. Where publication is required the authorities hold it is a substantial and important requirement, its aim being to inform the public of the personnel, address, etc., of the incorporators, the amount of capital, number and classes of shares of stock, that the public may judge of the business ability and integrity of the personnel of the corporation and its financial responsibility.

The punctuation of the above sentence and the context make the meaning of the phrase "and it shall go into operation" obscure. The sentence seems to have two main ideas: when the powers vest and when they may be exercised, the phrase "and it shall go into operation" evidently meaning the time when the corporation has a right to exercise the powers that are vested. It is suggested this phrase might be reworded because, as it is written, if the pronoun "it" refers to the charter, it is difficult to understand how the powers "vest" and yet do not go into "operation."

This same sentence provides, "it shall go into operation" after the shares designated in the charter are paid for "at the time and on the terms and conditions *specified.*" Time and terms and conditions specified where? The application may give directors power to fix or change the price of non par stock and the application must state "the number of shares of each class of stock necessary to be subscribed and paid for before the corporation shall commence business," but no time of payment for the stock or terms or conditions are specified. The phrase is confusing and might be left out.

The provisions for fraternal organizations, lodges, etc., appear as subhead (b) in the midst of the same paragraph as business corporations. This should be a separate paragraph. The old law had it as a separate paragraph.

(3) THE ACT AND RELATED STATUTES: Section 12 expressly repeals therein named existing sections but further expressly provides that no existing law is re-

pealed unless "specifically repealed herein." This leaves open a number of questions.

The Act provides the stock may be paid for in cash or "property." Sec. 4508 (4095) Hem. 1927 Code "a note, obligation, or security of any kind given or transferred by any subscriber for stock in any corporation shall not be considered, taken, or held as payment of any part of the capital stock of the company." While not in direct conflict this presents a doubtful question, since this section of Hemingway's Code is not specifically repealed.

The Act seems to make no provision for manner of obtaining amendments, except how existing charters may come within this Act. A fair construction would permit amendments to be procured in same manner as original charter, but sec. 4485 Hem. 1927 (4071) (which is not "specifically" repealed), requires that amendments shall be obtained through prior publication just as the original charters were obtained. How would a corporation whose charter was obtained under the old method and which has not, by amendment, come under this Act, safely obtain an amendment? Only, it appears, by the prior three consecutive weeks' publication before being sent to the Secretary of State and then by one publication after being received by incorporators.

Sec. 4517 (4104) Hem. 1927 Code provides that corporations must report their organization to the Secretary of State within thirty days after the organization, or the charter is null and void and all those doing business thereunder are partners. Sec. 1, of the Act, provides "it shall go into operation, after the number of shares designated in the charter of incorporation as necessary for the commencement of business shall have been subscribed and paid for either in cash or property, at the time and on the terms and conditions specified." Is Sec. 4517 yet in force? It is not "specifically" repealed. It is not clear why the omission to report the organization was originally of such gravity as to justify the penalty of this section and it might well be repealed or its rigor modified, especially since it has been the uniform practice of the Legislature, at each session, to enact that all corporations which had not made such reports might do so within 60 days after passage of the special act, and thereby be relieved of the penalty of this section. One such special temporary section, 4519, appears in Hemingway's Code, as a part of the general law. No doubt the code commission will leave out this section.

Usually preferred stock carries no voting rights. The corporation is controlled and managed by the holders of the common stock. But section 194 of the Constitution of Mississippi gives the right to vote in person or by proxy for directors, or for managers, to "Every stock holder," with the further right to "cumulate said shares, so as to give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall see fit; and such directors or managers shall not be elected in any other manner." To give full scope to the rights and limitations of common and preferred stock holders, it is essential that this section of the Constitution be amended—at least it might be submitted to a vote of the people to determine whether they wish to amend it.

(4) CHANGES AND ADDITIONS WHICH MIGHT BE HELPFUL: The old law provided that corporations might begin business when twenty-five per cent of the authorized capital was paid in. Sec. 4560 Hem. 1927 Code. The new Act repealed that law and provided that the application for charter should state "The number of shares of each class of stock necessary to be subscribed and paid for before the corporation shall commence business." It provides for no minimum amount. The application might state one per cent, and the corporation begin business when one per cent is paid if the charter should be approved by the Governor. The directors are not made liable for the debts contracted before the amount stated in the charter is paid in. The capital of a corporation, as to creditors, takes the place of individual liability of its members. The creditors might have practically no protection. For the sake of uniformity and protection to creditors the Act ought to state the minimum amount required to be paid in before the corporation is authorized to do business and make the directors liable for any debts contracted before such minimum is paid in.

Again, the rule which charges one dealing with a corporation with constructive notice of the limitations upon the authority of officers and agents of a corporation, and with the powers and purposes for which it is formed, and with its by-laws where such are shown by the recorded charter, is neither just, practical, nor reasonable. The exigencies of ordinary business alone will often prevent search of corporate records. Indeed, in many cases the search could not be made if desired. A traveler from New York to Mississippi could hardly be expected to furnish himself with the

charters of all the railroads on his route, or to study a treatise on the law of corporations. Ohio (having, by the way, one of the best corporation acts of any state) has this provision:

"The filing and recording of articles and other certificates pursuant to this Act is required for the purpose of affording all persons opportunity of acquiring knowledge of the contents thereof, but no person dealing with a corporation shall be charged with constructive notice of the contents of any such article or paper by reason of such filing or record." This meets the situation.

The Act authorizes issuance of non par stock. This was not authorized in Mississippi before. In recent years over forty of the states and the Dominion of Canada have enacted laws authorizing the issuance of no-par stock, New York being the first, in 1912. Corporations throughout the country have eagerly exercised this power. No doubt the new device is considered of great advantage by the corporation world. It has been enthusiastically received. The principal supposed advantages are:

1. Stockholders are not liable to creditors on the purchase of such stock beyond the price fixed as its purchase price.

2. It can be issued for contracts, patents, promotion services, and for other property rights or services of value.

3. The sale price of new issues may be decreased or increased, depending on the needs and condition of the corporation at the time.

4. It may be issued as bonuses in the aid of sale of other stock.

5. That it may be an advantage to the corporation in tax assessments.

But notwithstanding these advantages and the further advantage of the flexibility of the issuance of such stock as adapted to changing and complicated business conditions of the day, the possible abuses of non par stock which are coming to light indicate certain fundamental points which need more attention than most of the present laws have given. These fundamental points will be treated from the standpoint of (a) the creditors of the corporation and (b) the other shareholders of the corporation.

(a) As to the rights of creditors: The great beauty of non par stock is that the holder of shares is not liable to creditors beyond the price fixed by the corporation. This renders inapplicable the great mass of law as to stockholder's liability for bonus and watered stock. It may be is-

sued for contracts, patents, mines, promotion services, etc. It furnishes a very convenient means for providing liberally for those who have promoted the corporation. The vital difference between par value and non par value stock lies in the method of fixing the consideration or contribution to be paid by the subscriber to the capital of the corporation. In stock of stated par value the subscriber is required to contribute a fixed amount and the corporation cannot fix a different amount as against creditors. The statutes generally provide that when the consideration agreed has been paid or delivered for non par stock, the stock shall be deemed full paid and shall not be liable for any further call or assessment. Our statute provides non par stock may be issued from time to time for such consideration as may be stated in the charter or from time to time fixed by the board of directors "but such consideration must be paid in cash, or in property or services at a valuation fixed by the board of directors" and when the consideration "so fixed, has been paid or delivered, shall be deemed full paid stock, and not liable to any further call or assessment thereon, and the holder of such shares shall not be liable for any further payment thereon," except as provided in case of banks. As between the option of fixing the price in the charter or having the directors fix it from time to time it is safe to say few charters will fix the price. That leaves the price in the discretion of the directors. That such power, honestly exercised, may be of great benefit to the corporation will be shown hereinafter. But what are the rights of the creditors against such stockholders? The capital of the corporation is liable and the subscriber will be liable to pay the unpaid price of the stock. *American Refining Co. vs. Staples,* (Texas), 260 S. W. 614.

But suppose for services of promoters, or contractual or patent rights or property of little value, large blocks of non par stock are issued at values largely in excess of the true value of such services or property, as is so frequently done, what of the right of creditors? The contribution to capital is little and the stock is deemed fully paid and non assessable. A recent federal case illustrates this. Upon reorganization 750 shares were given away and 2250 shares of no par value common stock were divided between the promoters of the new corporation, organized under the law of Delaware, in consideration of a worthless option. The new company was adjudged bankrupt and the trustee sued the holders of the no par value stock on the ground it had

not been paid for. It was held the owners of the stock were not liable. *Johnson vs. Louisville Trust Co.*, 293 Fed. 857, 36 A. L. R. 785.

The consideration for the shares is fixed by the directors, and control by the promoters can easily be secured by the issue of say 51 per cent of the stock at a nominal price in property.

It is suggested that this situation might be helped by requiring that the value of the consideration of non par stock fixed by the directors should appear in the financial reports, or that the price for which the first issue of non par shares shall be sold be stated in the certificate of incorporation, and thereafter periodical statements to be filed of the number of shares issued and the consideration received therefor; also that the value of property acquired for stock be appraised. Provision might also be made for holding stockholders liable as on part paid stock when the consideration turns out to be fraudulently overvalued.

Again, there is danger to creditors in the power to withdraw the capital in the form of dividends. What is the capital and what the surplus in non par stock corporations? Incorporation laws enable men to organize and do business as a corporation without the individual liability of partners. The corporate capital takes the place of the individual liability of the stockholder. This might be remedied by requiring a minimum capital stock as a condition of the right to do business and defining what part of the proceeds of the sale of stock shall be devoted to capital which cannot be distributed as dividends. If a large part of the consideration received for non par stock can be credited to surplus and distributed as dividends, this opens the door to fraud upon creditors by reduction of the capital to which creditors have a right to resort for payment of debts.

(b) As to the rights of other shareholders: It may be desirable for a going concern to increase its capital by a new issue of stock rather than issue bonds or notes after the stock has fallen below par. If the concern is very profitable the price may be increased and the increased price inure to benefit of shareholders. But suppose A has purchased his stock for one hundred dollars a share and another issue, with same rights as first, is issued at sixty dollars a share; B, paying sixty dollars, receives same benefit as A paying one hundred dollars. Theoretically the subscriber should have some assurance that others will not pay less than he is required to pay.

Or suppose the promoters issue to themselves fifty-one per cent of the stock. They proceed to elect the directors who then fix a high price for the stock, thus enabling the organizers to appropriate to their benefit the capital contribution of these subsequent purchasers who really finance the corporation. Consideration might be given the idea of providing that no stock shall be issued for less than prior subscribers were required to pay, except under conditions of necessity prescribed by the statute, or that the new issue of stock be first offered to existing subscribers.

SOME PROBLEMS OF BENCH AND BAR

By Josiah Marvel *

While there are many problems facing the Bench and the Bar, the biggest problem of all is having them recognize that there is any problem at all.

Many problems are considered by those who attend State and National Bar Associations or who read the legal magazines but these constitute only a small percentage of American lawyers. The remaining high percentage are absorbed solely in the problems of cases, fees and making a living.

They fail to recognize the fact that they hold governmental jobs. They overlook the fact that they have been created by governmental processes and owe something back to the people who make and sustain government.

The Judicial Departments of Government have been created by constitutional action of both states and nation. As members of these departments of Government the Bar has many special privileges. We are the only governmental officers that have a tenure of office limited only by good behavior. As such governmental officers we are now permitted to charge for our services to private clients and thereby make a living for ourselves and our families. We are allowed to perpetuate ourselves by the admission of new members, having the power to prescribe the rules governing such admission to membership. We also have the power of purging our membership of undesirable members.

Can it be thought for a moment that the people of state and nation, speaking through their constitutions, would create a class of citizens with such privileges and powers simply for the purpose of enabling individuals to make a living? This is indeed far from the case. The people realized that the administration of justice between man and man is indeed the very foundation of government. That to secure this it was necessary to create a Bench with the power in turn to create a Bar; the Bench to be paid by all the people in order that it might show no favor to any man; the Bar to be paid by those who engage their assistance

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in establishing their rights. The foremost thought, however, in the minds of the people was to create a department of Government clothed with the power and burdened with the duty of administering justice for all the people.

Being so created and so constituted we owe an obligation back to the people through whose sovereign powers we were so created and constituted. In order that we may face this obligation, at the threshold we are required to take an oath of office before we are permitted to enter the temple of justice as a minister. We have our particular clients and are bound to give them the best services of which we are capable. But there is beyond this an obligation to the people to give them the best administration of justice that can be devised. To enable us to properly meet this obligation we must become class conscious; we must develop the feeling that as members of the Judicial Department of Government that we each have a Governmental responsibility; that we are responsible for putting that Department of Government on that high plane which is fully expected by the people who created it.

Mankind desires perfection and strives for perfection, but perfection is never attained. This desire and effort, however, has enabled men in almost every walk in life to make tremendous strides toward perfection. We have seen this in education, transportation, and in all industries. This has gained the approval and won the confidence of the world at large. Now we sit by and fully rely upon the Engineering Departments of the various industries to devise and create improvements to meet the needs and desires of mankind, yet all of these advances and improvements would be futile indeed if they cannot be grounded upon an equal reliance upon the administration of justice. Without due protection of life, liberty and property by the Judicial Department of Government, all of mankind's efforts toward better things would fade away. The layman looks about and sees efficiency everywhere and quite naturally expects the same degree of efficiency in the administration of justice and when this is not found, he does not hesitate to complain. He criticizes the law's delays and will cite to you cases which have taken years, in which to reach a final judgment. He will ridicule the mysterious technicalities surrounding the various legal steps taken in the progress of a suit and charge that the Court and the lawyer are jockeying with justice, while the litigants are suffering from the delay and at the same time paying the bills. He

will join Chief Justice Taft in charging that the administration of criminal justice is a disgrace.

The plain business man whom you meet on the street looks about and sees progress and efficiency everywhere. Every business that he knows about has kept step with the needs of the times, except the business of administering justice between man and man. He complains of old-fashioned methods that permit a man to secure years of delay in paying his dollar debt to his neighbor and likewise permits a criminal to secure a similar delay in paying his moral debt to the community. He cries out that justice delayed is partially denied and that this applies as well to the man charging another with breach of contract, as to the community charging a member with a breach of its criminal laws. This complaint of individual to individual has been taken up by the press, whose voice is reaching millions and the threat is plainly made that the Bench and Bar will be driven, if they do not lead, in making the administration of justice more efficient in meeting the needs of the times. He awaits the result of the work of the chemical engineer, the mechanical engineer, the electrical engineer, the civil engineer and all of the other engineering departments of industry, because of the great success that he has seen developed in the past and because further he knows nothing about these engineering questions. He realizes, however, that the administration of justice is a governmental operation and in all governmental operations he considers himself an efficiency engineer and he believes with great earnestness that if greater efficiency in the administration of justice is not carried forward by Bench and Bar, he can promptly devise a remedy by passing a law. Through this criticism the American public has issued a challenge to the Bench and Bar and it is for us to say whether we will accept this challenge and proceed with our work or whether we will declare ourselves impotent and unable to formulate steps to be followed by the Judicial Department of Government, in order that it may meet the present day needs of mankind.

There is growing recognition on the part of the Bench and Bar that the Judicial Department of Government has not attained that promptness and efficiency in the administration of justice as to secure the approbation of either the Bench and the Bar or the people whom they serve. The leaders of thought have proposed many remedies that may more or less meet the problems that are before us. I will consider only three of these suggestions:

I. The Power of the Court to make rules governing pleading, practice and procedure.

II. Power of the Court to assist the Jury in finding facts by analyzing and commenting on evidence.

III. The Power of the Courts, at the election of the accused, to try and decide criminal cases without a jury.

I

The Power of the Courts to Make Rules Governing Pleading, Practice and Procedure

A few years ago leaders of legal thought began to bring forward the suggestion that if courts, either through their inherent power or through statutory authority, would study the questions of pleading, practice and procedure, they could promulgate rules governing all litigants that would greatly expedite the administration of justice. Their voices, however, were like the voice of one crying out in the wilderness. The suggestion fell upon ears that were deaf indeed. During the previous fifty years the thought had practically faded from the legal mind of America. They had grown accustomed to the rules and regulations made by the Legislative Department of Government to direct and control the Judicial Department of Government and had grown callous to the burdens imposed thereby. On another occasion I have said that this legislative control was led by the adoption of the Field Code in New York in 1848, followed by Missouri in 1849; California, 1850; Iowa, 1851; Kentucky, 1851; Minnesota, 1851; Indiana, 1852; Ohio, 1853; Oregon, 1854; Washington, 1854; Nebraska, 1855; Wisconsin, 1856; Kansas, 1859; Nevada, 1860; North Dakota, 1862; South Dakota, 1862; Arizona, 1864; Idaho, 1864; Montana, 1865; Arkansas, 1868; North Carolina, 1868; Wyoming, 1869; South Carolina, 1870; Utah, 1870; Colorado, 1877; Connecticut, 1879; Oklahoma, 1890; New Mexico, 1897; Alaska, 1900; and Porto Rico, 1904; a total of twenty-eight states and two territories. These steps taken during the last seventy-five years in this country show either that the courts have abdicated their original rule-making power and surrendered it to the Legislative Department of Government, or that the Legislative Department has reached out and appropriated the power regardless of the court's desire in the matter.

It is interesting to compare the action of the English during practically this same period of time. They began

with the Civil Procedure Act of 1833 providing that eight judges should make rules for the reform of pleading, under which Act was promulgated the Hilary Rules of 1834. The Statute of 1850 gave them a wider power and the Statutes of 1852 and 1854 broadened the powers yet again. The Chancery Amendment Act of 1850 started in the same direction by empowering the Chancellor, with the concurrence of the Master of the Rolls and one of the Vice Chancellors, to make general rules and orders, which Statute was greatly broadened in 1858, and resulted in the Great Consolidated Orders of 1860.

The progress and success of the Rule-Making Powers of the English Courts of both law and equity, prepared the British people for the Judicature Act of 1873, which went into effect in 1875, starting with a set of rules and creating a Rules Committee composed of eight judges and four lawyers. This committee may change almost anything in English procedure by giving forty days notice of a proposed new rule or a proposed amendment to an old rule. To be sure either House of Parliament may veto the rule, but neither House has ever exercised this power, indicating conclusively that the English people are satisfied that the administration of justice has been carried on by the English Bench and Bar in a better way than can be devised by the representatives of the people in Parliament.

It is strange indeed that two peoples tracing their law and their legal procedure to the same source, should so diverge in the last generation in their manner of administering justice. On the one hand we have English Rules of Practice and Procedure made flexible and adjustable to the end that they may be competent and dutiful handmaidens to the substantive rights of man. We see a Rules Committee clothed with the power and responsibility of keeping them abreast with the growth of the substantive law. We see a set of rules free from the need of radical changes and reforms because of the gradual changes made as needs are shown. During these many years the Rules Committee of England has modified or created an average of twelve rules per year.

On the other hand, in America we see in Federal suits at law and in more than half of the states an iron hand reaching out from the national capital or from the state capitals to command in what manner the administration of justice may proceed. The legislative omnipotence of nation and state has not only exercised a proper power of creating courts and defining their jurisdiction, either by constitution

or statute, but it has gone far beyond this and prescribed by statute how this jurisdiction shall be exercised. I concede the right of the Legislative branches of Government to say what courts may do, but I object when they attempt to say how the courts shall do it.

By simply examining the surface, it would seem that the English people have developed increased confidence in their Bench and Bar while at the same time the American people have lost faith in theirs. This, I am quite sure, is not the case. I have no misgivings as to the confidence of the American people in the ability and integrity of the Bench and Bar of America. Of course, we cannot shut our eyes to the occasional disappointment of litigants when they see what appears to be a miscarriage of justice because of a technicality or a delay. Under such circumstances, it is quite natural that such disappointment should be charged to the administration of justice by the Bench and Bar without realizing that the Bench and the Bar may be administering justice in exactly the way that is prescribed by the representatives of the people in their Legislative Assemblies. If the American people have gone wrong in their Legislative Codes of procedure without knowing the result of their acts, the fault is not so much their fault as it is the fault of the Bench and the Bar. We have sat by and permitted a misdirection of legislative activity and have washed our hands of the responsibility because we did not participate. Just so long as the American Bar continues this attitude, just so long will the legislative mistake go on. Here and there we have heard the occasional voice crying out in the wilderness. Disciples have been comparatively few and Apostles have been fewer still.

By looking about us we can readily see that the Legislative Departments of Government are, generally speaking, in favor of the Rule-Making Power in recent years. Go to your State Statutes and you will find that every Industrial Accident Board and every Public Utilities Commission is given the right to prescribe rules to govern the exercise of its powers and in most instances these Boards and Commissions are composed of laymen. Go to your Federal Statutes and you will find the power to prescribe its own Rules of Practice and Procedure has been given to the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Board of Tax Appeals, the Board of General Appraisers, the Court of Customs Appeals, the Commerce Court, the Court of Claims, the United States Court for China, and the present

Supreme Court of the District of Columbia. If the regular courts are the only ones left to drag the ball and chain of legislative supervision, it can not be caused by an objection on the part of Legislatures to the granting of Rule-Making Powers. The facts show a contrary attitude. This being true, then indeed the fault must be with the Bench and Bar, and it is quite time that we took inventory of our short-comings and devised steps to cure them. It must be either that the Bench and Bar are not convinced of the merits of the Rule-Making power or that proper steps to convince the Legislative Department of Government have not been taken. Interest in the matter, however, is increasing but it will not increase in the manner and to the extent that its merits justify until you and I and every member of the American Bar are willing to stand up and be counted as ready to assume our individual responsibility. We must develop a greater consciousness of the fact that the Bench and the Bar of state and nation, constitute the third Department of Government. The Executive Department has its responsibility. The Legislative Department has its responsibility. The responsibility of the Judicial Department of Government is the administration of justice. If we are willing as a body to assume our responsibility for this Department of Government and convince the Executive and the Legislative Departments of Government of our good faith, I do not doubt that the nation and the several states will clothe our Department of Government with full powers to perform its duties in the most efficient way. This good faith, however, cannot be assured simply by the protestation of individual lawyers. It must be done through an organized Bar. It does not matter whether this organization comes through incorporation or co-ordination, it will be enough if it is organized to a point of becoming effective. Whether we offer to perform our work through the agencies of the judges alone or through the agencies of a Judicial Council, or through the agencies of an Organized Bar, it makes no difference. What will produce the best results in one state may not produce the best results in another. Each state must choose a method suited to its needs.

In the last few years, however, great progress has been made toward the adoption of this great reform. The report of the Committee on Judicial Council and the Rule-Making Power of the Court of the Conference of Bar Delegates of the American Bar Association will report this

more in detail at the next meeting of the American Bar Association in Memphis in October. It will show that—

California, Connecticut, Illinois, Kansas, Kentucky, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Wisconsin, Massachusetts, Michigan, Washington and Virginia, have more or less recently created Judicial Councils clothed with the duty of submitting matters pertaining to the jurisdiction of Courts to the Governor and Legislature, and matters pertaining to the promulgation of Rules to the Court in those states where the Court has already the power. It will also show the present status of the Rule-Making Power in the various states. It will show an increased exercise of the Rule-Making Power by those states in which the Common Law Power or Statutory Power has heretofore existed, and will also show the activities and the forward steps taken in a large number of states toward increasing the power by statutory action. Many of the objectors to this reform have cried out with much vigor that if the legislature of the state should clothe the courts with power to promulgate rules for the expedition of its business, it would be a delegation of legislative power and therefore unconstitutional. As I said upon another occasion, the general law upon this subject is reviewed in Ruling Case Law, Volume 7, at page 1022, and in Corpus Juris, Volume 15, at page 914, but by circumstance we have a very recent decision by the Supreme Court of the State of Washington, in the case of *State vs. Superior Court,* in Volume 267 of the Pacific Reporter, at page 770, that so completely answers the objectors that I am persuaded to discuss this case with some degree of fullness.

In the year 1925 the Legislature of the State of Washington enacted the following statute:

"AN ACT TO PROMOTE THE SPEEDY DETERMINATION OF LITIGATION ON THE MERITS AND AUTHORIZING THE SUPREME COURT TO MAKE RULES RELATING TO PLEADING, PROCEDURE AND PRACTICE IN THE COURTS OF THIS STATE. . . .

Section 1. The Supreme Court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever

nature by the Supreme Court, superior courts and justices of the peace of the state of Washington. In prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

Section 2. When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

Section 3. This act shall not be construed to deprive the superior courts of power to establish rules for their government supplementary to and not in conflict with the rules prescribed by the Supreme Court." Laws of 1925, c. 118, p. 187.

Acting under the statute, the Supreme Court of Washington promulgated certain rules of court relating to pleading, practice and procedure, and, among others, promulgated the following rules:

"1. The testimony of a witness may be taken by deposition, to be read in evidence in an action, suit or proceeding commenced and pending in any court in this State, in the following cases:

. . .

5. When the witness is (a) a party to the action or (b) an officer, agent, partner, stockholder or employe of a party or . . ."

Certain witnesses refused to give their depositions under the rule and the Superior Court was about to hold the witnesses in contempt of court for disobedience to its rule when the question of the constitutionality of the statute, under which the rule was promulgated, was taken to the Supreme Court of the state. The first question raised in the Supreme Court was based upon the claim that the act cited above was unconstitutional for the reason that it delegated a legislative power to the courts. Upon this point the Court said:

"In its essential matters the argument upon this point is that from the beginning of statehood it has always been the recognized policy of the State that the Legislature should prescribe procedure and practice in the courts, leaving only to them the right to make rules involving decorum and orderly government. While it is true that the Legislature has functioned in such a capacity ever since statehood, that fact becomes not at all controlling in determining whether the making of such laws for procedure and practice is in itself an exclusive legislative function. Indeed there is excellent authority from an historical as well as legal standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but purely a judicial function. In 1792 the Attorney General of the United States requested information from the United States Supreme Court concerning the rules and regulations of the Court. The Chief Justice, speaking for that

tribunal, said that the court considered 'the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.' Hayburn's Case, 2 Dall. 411, 1 L. Ed. 437. At the time of the pronouncement of the court the procedure in England was controlled by rules enunciated by the courts. However interesting this question may be when viewed from the point of legislative usurpation of judicial powers, it will be unprofitable to further delve into the argument in this opinion, since there confronts us always the debatable question of whether long acquiescence by the courts of the state in legislative control of these matters is not sufficient to require a holding that the Legislative body, if it so desires, can continue that supervision.

The point here in controversy can be decided upon a far more stable foundation. 'Assuming the right of the Legislature to make rules for the Court, and acknowledging its continued action in that respect, it does not follow that such action is a legislative function.' . . .

We think it follows that the Legislature, although formerly functioning in this state as the source of rules of practice and procedure in the courts, did not, in so doing, perform an act exclusively legislative, and may, if it so desires, transfer that power to the courts without such act being a delegation of legislative power."

The second ground upon which the unconstitutionality of the act was based was the contention that the statute could not give the Supreme Court the power to make rules for inferior courts. Upon this point the Court said:

"Being satisfied as we are that section 24 is not a grant of power, we are faced with the question of determining whether the Legislature, having heretofore exercised the power of making rules for all the courts, can delegate the power to one court to make rules for another. Bearing in mind that this is not a delegation of a power that is purely legislative, but one that may rightly be delegated to another tribunal, is there anything violative of fundamental law or the Constitution in permitting the highest judicial body in the state to prescribe rules for an inferior judicial body? Since this is a case of an appellate court prescribing rules for a trial court, it must at once be manifest that such a power should be placed with the reviewing court, since it is always charged with the duty of determining whether the rulings of the trial court have been such as to operate to the disadvantage of the litigants. State ex rel. Ross v. Call, 39 Fla. 504, 22 So. 748."

It was also contended that the rule in question was not in the interests of procedure and practice, but invaded the

realm of substantive law, but the Court held to the contrary.

The above case furnishes the proponents of the rule making power of the Court the greatest support and comfort, and will, of course, remove the objections heretofore made by many of the opponents to this reform.

If, as is suggested above, the people conclude that the administration of justice should properly be placed in the full control of the judicial department of government, it, of course, becomes the duty of the people to step forward to this end. We may be sure, however, that the people in control of the whole government will not carry forward this reform unless they are persuaded and led by the members of the Bench and Bar who are better able to perceive the great benefits that would arise therefrom. It therefore comes back to us of the Bench and Bar as our duty.

I repeat that we have received a challenge that we cannot disregard. No lawyer can meet his full obligation by simply protecting the rights of individual clients. He is a member of the government through his membership in the judicial department of government. His rights as an attorney at law are conferred upon him by governmental action and there rests upon him an obligation back to that government to do those things which in his judgment will make for the better administration of government. If he is convinced that an enlargement of the rule making power of the court and a proper exercise of that power by the courts will produce beneficial results in the administration of government, he is bound to use his force and his influence to that end.

II

Power of the Court to Assist the Jury in Finding Facts by Analyzing Evidence

The Anglo-Saxon race has been and is devoted to the right of trial by jury as a bulwark of individual liberty. From *Magna Carta* up until now they have been very jealous of any encroachment upon the right of a jury to decide issues of fact arising at law. At the time of our Revolution we adopted the Common Law of England insofar as it fitted the conditions of life in a new country and many of our constitutions provided—

"The right of trial by jury shall be as heretofore."

or some similar language. By this they adopted the Common Law jury and the Common Law Jury trial of England.

Such a trial permitted the trial judge to comment upon the evidence and assist the jury to analyze complicated situations, leaving to the jury, however, the final determination of what the facts might be. Let me cite you the views of leaders of legal thought upon this matter of comment upon the facts by the trial judge.

Lord Hale said:

"Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. However, he is able, in matters of law emerging upon the evidence, to direct them, and also in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question, and the knot of the business, lies; and by showing them in his opinion, even in matters of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matters of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact whereof the jury are the judges."

Blackstone said:

"When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence." (3 Com. Ed. 1799, p. 375.)

Chancellor Kent said:

"I am far from wishing to restrain the judges of the courts of law from expressing freely their opinion to the jury on matters of fact . . . No man can be more deeply sensible of the value and salutory tendency of this judicial aid and discretion . . . All that I feel it my duty to contend for is that when the judge delivers his opinion to the jury on a matter of fact, it shall be delivered as mere opinion, and not as direction, and that the jury shall be left to understand clearly that they are to decide the fact, upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt."

Thayer said:

"It is not too much to say of any period in all English history that it is impossible to conceive of trial by jury as existing in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury in such form as that is not a trial by jury in any historical sense of the word. It is not the venerated institution which attracted

the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected."

Elihu Root said:

"It is the function of the judge to promote the will of the sovereign people that justice be done to all parties before him; to see to it, that the facts are really ascertained; that the law is honestly applied; that unfair advantage is not taken; that witnesses are protected against improper treatment; that the public time is not wasted. . . . On the other hand, it is the business of the lawyer to conduct a case so that his client will win. . . . But it is plain that in all the transaction the representative of public justice is the judge on the bench, and that there is necessarily between him and counsel on each side always a certain antagonism and contention. . . . The restiveness of the bar under the control of the judge on the bench finds its expression very widely in our legislation regarding procedure. That legislation is of course framed by the lawyers in our legislatures, and unconsciously, doubtless, their natural attitude of antagonism has led to a great multitude of provisions designed to protect the bar against interference from the bench. The most striking illustration of this tendency is presented by the provisions found in many states, and quite recently urged upon Congress, prohibiting the judge from expressing any opinion to the jury upon questions of fact. From time immemorial, it has been the duty of the court to instruct the juries as to the law, and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and explanation regarding the facts which stands any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? It is to make it certain that the individual advantage gained by having the more skillful lawyer shall not be taken away. It represents the individual's right to win, and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers, and to prevent the referee from interfering in the game. . . .

A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure, would tend greatly to make the administration of justice more prompt, inexpensive and effective; and this recognition must come from the bar itself."

The Supreme Court of the United States at various times has said:

"It must consequently be taken that the word 'jury', and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument."

"Trial by jury in the primary and usual sense of the term at the common law, and in the American Constitution, is not merely a trial by jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution, but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."

"As the guaranty of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the 6th Amendment, of the rights of the accused in criminal prosecutions is to be taken as a declaration of what these rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of these rules, as involving the fundamental rights of life, liberty and property."

Judge Hogan in his most excellent review of this subject states as follows:

"Such, then, was the model of the jury system supplied to us by the English common law. Under that law, the trial judge was the pivot of the system. In this country, we adopted the system, but in most of our jurisdictions we left out the pivot. The result is the English system remains steady, while our system continues wabbly. A few years ago, Sir John Simon, then Attorney General of England, was the guest, in this country, of the American Bar Association. He then contrasted the American trial courts with the English trial courts. He pointed out that in our courts, the lawyers conducted the trial, while in the English courts, the lawyers 'assist the judge in the trial.' So, instead of following the English model, we have departed radically from it. Instead of empowering our trial judge with authority to charge on the facts, which is the strong feature of the English legal polity, we have, for the most part, as I have already indicated, 'tied him down,' as Dean Pound has forcibly put it, 'by elaborate procedural legislation so as to prescribe in advance almost everything he shall do, and how he shall do it, from the time he enters the court house, except, it has been said, the peg on which he shall hang his hat.' It would be a pity to deprive the luckless judge of the convenience of that one peg; but he could just as well hang his hat on the floor, and it would be the salvation of the American legal polity, if only that legislation could be forever cast up, dried, and hung on that very peg to wither away into utter oblivion.

Although it is our pride, and the truth as well, to boast that we have followed more closely to the common law in this country than they have recently in England, just when, why, and how, we happened to strike out on a pathway of our own, and refuse

to follow, in most jurisdictions, the characteristic feature of the common law jury, the power of the judge to comment on the facts, furnishes the most interesting story in American jurisprudence."

The states in their attitude regarding this question may be classified as follows:

(a) Those in which such comment is forbidden by state constitutions—

Tennessee, 1796; Arkansas, 1836; California, 1849; Nevada, 1864; South Carolina, 1868; Washington, 1889; Delaware, 1897; Arizona, 1910.

(b) Those in which comment has been forbidden by statute:

North Carolina, 1796; Mississippi, 1822; Louisiana, 1825; Illinois, 1847; Georgia, 1850; Alabama, 1852; Texas, 1853; Massachusetts, 1860; Iowa, 1860; Oregon, 1865; Michigan, 1867; Maine, 1874; Florida, 1877; North Dakota, 1877; New Mexico, 1880; Idaho, 1881; Wyoming, 1886; South Dakota, 1887.

(c) Those in which comment has been narrowly restricted by decisions of the Supreme Court.

Milton vs. Hunter, 76 Ky., 163 (1877).
Wood vs. Deutchman, 75 Ind. 148 (1881).
Minich vs. Peoples, 8 Colo., 440 (1885).
Ry. Co. vs. Ryan, 49 Kan., 1 (1892).
Yoder vs. Reynolds, 28 Mont., 183 (1903).
Kleutch vs. Ins. Co., 72 Neb., 75 (1904).
White vs. Sohn, 63 W. Va., 80 (1908).
United Rys. vs. Carneal, 110 Md., 211 (1909).
Dixson vs. Transit Co., 165 Mo. App., 240 (1912).
Slayle vs. Amos, 111 Okla., 71 (1925).
Mayer vs. Commonwealth, 142 Va., 649 (1925).
Trucking Co. vs. Knapp, 157 N. E., 402 Ohio (1926).

(d) Those states which retain the Common Law Jury Trial by permitting the courts to comment upon the evidence and assist the jury in arriving at conclusions of fact:

Connecticut, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Utah, Pennsylvania, Vermont, Wisconsin.

The right to trial by jury under the Federal Constitution has been construed to mean the common law jury trial handed down to us by England at the time of our separation, as shown by the extracts from the decisions of the Supreme Court of the United States above cited.

It is a curious thing that so many states have been led to depart from the Common Law Jury Trial and have set

up a jury trial that makes all verdicts a contest between the personality and persuasiveness of the contending lawyers, where the powers of advocacy of one man may greatly excel the power of advocacy of another. Some time since I noticed that a western lawyer was given a testimonial dinner by his fellow members of the Bar upon his having won one hundred consecutive jury trials. No one can believe that those one hundred consecutive successful verdicts were every one right. No lawyer can be on the right side in one hundred consecutive jury trials. He doubtless won a part of the verdicts because they were right. The others he won by his superior skill in advocacy, in persuasion, and in the handling of evidence. The juries doubtless at times greatly befuddled followed their feelings and this remarkable lawyer and rendered verdicts as he desired. Certainly such juries and such trials by such a lawyer needed the comment of a judge, unbiased by advocacy and impersonal toward the litigants. All over this land we see jury trials where the jury is persuaded one moment by one skilled lawyer and persuaded another moment by another skilled lawyer, ending up in doubt and perplexity and arriving at verdicts by chance. The only mouth at such trials that could speak to the jury with real unbiased helpfulness is closed by constitution or statute, or by decision of court. He simply sits as a moderator, seeing to it only that the rules of the game are adhered to; otherwise leaving the trial to be conducted by contending lawyers. In England it is so different where the trial is not simply before the judge, it is by the judge assisted by counsel on both sides. Whether or not, in the absence of constitutional provision, statutes forbidding comment by the judge in accordance with the Common Law Jury Trial is constitutional, has never been tested. Judge Hogan, however, does not hesitate to assail their constitutionality as follows:

"One way to arouse discussion and fresh thought is to question the constitutionality of the statute forbidding the judge to comment on the testimony; and to point out that mere lapse of time, no vested rights being jeopardized, is not sufficient to prevent raising that question, although the statute has remained unassailed, as most of these restrictive statutes have, for many years. Such legislation is unconstitutional because it invades the province of the judiciary; it does violence to the separation of powers; it trenches upon the common law power of the trial judge, a discretionary power inherent in his judicial office, a power vested there by the state constitution before the legislature ever existed. The legislature may regulate by statute matters of practice, pleading, and procedure. It has, however,

no constitutional authority to regulate the personal conduct of the trial judge upon the bench while discharging his official duty of administering justice. Yet that is exactly what the legislature does when it prohibits the judge from commenting on the facts in aid of the jury, as it fetters him in the performance of his personal duties. Under the common law, the functions of the judge are as 'inviolate' as those of the jury. This is so because his functions are of the very essence of the system of jury trial which we inherited from England. After long acquiescence by the southern and western courts in these enactments, it may appear audacious to question their validity, but I do not shrink from so doing. . . ."

"My position is that parties litigant have a constitutional right to the benefit of the wise discretion of the trial judge, exercised in his power to assist the jury in arriving at the truth of the facts, and to see that justice is done, provided only the judge, in so doing, does not directly, or indirectly, take to himself the prerogative of the jury finally to determine what that truth may be. The parties have such a right because that power of the judge is a part of the very substance of the trial by jury known to the common law."

Those who have been able to prohibit state trial judges from assisting the jury by comment upon the evidence, have assailed the right of Federal Judges to make such comment in the manner they have exercised it for nearly one hundred and fifty years. It is to be hoped that those members of Congress who have been led to advocate this restriction upon the power of the Federal Judge may not only see the errors of their way in that direction but will permit themselves to be convinced of the merit of this reform and join those who desire to strike the shackles from the mouth of the trial judge in their respective states. Such a reform it is believed will make for a more prompt and efficient administration of justice and if this be true the American lawyer is again challenged to stand with the advance in securing the benefit for litigants everywhere.

III

The Power of the Courts, at the Election of the Accused, to Try and Decide Criminal Cases Without a Jury

One of the greatest benefits arising out of the separation of the sovereignty of states is the fact that each state becomes an experimental laboratory in governmental matters. One state can try out some governmental plan and if found to be good, it can then be taken up by another state and applied to its own condition and situation. Such has

been the case in the two subjects heretofore spoken of and such will be the case with the subject now in hand. This paper is now much too long and with this subject I must be brief.

The two outstanding experimental laboratories concerning the question at hand are the states of Maryland and Connecticut. Our authorities regarding these states are Judge Bond of Maryland and Judge Maltbie of Connecticut, and from their papers written for the Judicial Council of Massachusetts, I draw my facts. The older practice is in Maryland and is traceable to as early a date as 1693. At that time the records show that defendants in criminal charges could enter a plea of not guilty and put himself upon the Court, instead of putting himself upon the country. Judge Bond cites many cases of such trials by the court until their statute of 1781, which was passed to relieve from costs persons prosecuted and not found guilty, including any—

"person who may be prosecuted for any misdemeanor or offense and discharged by the Court on submission or fined not exceeding one shilling current money or prosecuted for any crime and acquitted on trial by jury."

A Statute was passed in 1787 and another in 1793 placing some restrictions upon this practice, but in 1809 an Act was passed reciting the great saving in time and expense by the practice of trying criminal causes by the Court and providing that the courts of criminal jurisdiction should

"determine on the whole merits of the case which may be to the said Courts respectively submitted."

Up until this time the practice was limited to minor cases but in 1823 it was applied in a very important case of conspiracy and in 1852 a statute was passed enlarging the practice authorizing the courts to try any person upon any charge whatsoever, including capital offenses, and in 1860 passed the statute now in force as follows:

"Any person presented or indicted may, instead of traversing the same before a Jury, traverse the same before a Court who shall thereupon try the law and the facts."

and in 1872 the Maryland court decided that the accused alone by his election may compel such a trial and the consent of the state was not required. Judge Bond sums up the result in Maryland as follows:

"So, in this State the practice is one of respectable age, and it seems to Maryland lawyers to be fully as natural a feature of the administration of criminal justice as does the jury trial. They have been quite unaware that there was anything extraor-

dinary in it, and are always surprised when they learn that in other jurisdictions an accused cannot have a trial without a jury if he wishes it.

A docket of jury trials only is something of which Maryland lawyers can hardly conceive; and it would dismay them. It would slow down the court work greatly, and the courts would have to be multiplied to cope with the work. And, of course, the demands upon citizens for jury service would be increased.

Within the memories of living members far the greater number of trials in criminal cases in Baltimore City have been held before judges alone. A like experience is reported from the county courts. In the year 1924 over 90 per cent of all the cases tried in the Criminal Court of Baltimore City were so tried. A count made ten or twelve years earlier showed 70 per cent so tried, and this is probably the lowest percentage now likely in the course of any of the variations. Ordinarily two criminal courts are sufficient to care for the criminal dockets in the city, which has a population of nearly 800,000. At times there is not enough unfinished business for two courts, and one is able to keep up the work. It is ordinarily possible to give trials without any delay beyond such time as may be needed for preparation, and there are times when the court seems too close on the heels of the Grand Jury, when the court is prepared to give trial on the day after indictment. For some years, now, only one jury panel has been kept in attendance upon the two criminal courts, and, even so, the jurymen spend much of their time sitting aside as spectators. Of the 1,500 criminal cases docketed during the four months of the January, 1925, Term of the Criminal Court of Baltimore City all except 177, mostly those last docketed, were disposed of before the final day of the term. Unquestionably this comparatively rapid disposal of business is due to the prevalence of trials without juries. There is no common length for trials in that form, of course, but they are very much shorter than jury trials. It seems safe to say, for a guess, that the non-jury trial of a given case requires no more than a third of the time which would be required to try the same case with a jury. This estimate is confirmed by lawyers familiar with the criminal court work.

The trials are usually less formal than trials before juries, and, of course, quicker. There is no delay in selection of the tribunal, often opening statements are omitted as unnecessary, the evidence is more direct and concise, and there are fewer objections or other interruptions. The judges as they go along ask questions to clear up matters for themselves. They may, without inconvenience, interrupt a trial and hold it open for days until other witnesses they might like to hear are hunted up. They may hold it under advisement for days, after all the evidence is in, to reflect upon it. Sometimes the examination of witnesses suggests the existence of additional evidence which may go right to the point of final difficulty in the judge's mind,

and where the evidence may be on the side of the accused the judge is especially careful to bring it into the case. For instance, a negro tried for complicity in a robbery, and identified as a participant, seemed to expect conviction, but yet earnestly denied that he was present. During some questioning by the court it appeared that the man had not fully understood the requests previously made of him for the names of witnesses in his favor, and the trial was suspended for a week to get any witnesses he might desire. The witnesses came, and gave such strong testimony of the prisoner's presence elsewhere at the time of the commission of the crime that the prosecuting witness declared he was afraid he might have been misled by a resemblance. The man was, of course, acquitted.

Arguments on the facts are often omitted in the courts of Baltimore City in these cases, too often, perhaps. The judges sometimes have to call for the assistance of argument."

In Connecticut the legislature enacted a statute in 1874 providing that a party accused of crime might elect to be tried by the court instead of by the jury but in 1878 this statute was repealed. In 1921 the legislature enacted practically the same statute, as follows:

"In all criminal causes, prosecutions and proceedings the party accused may, if he so elect when called upon to plead, be tried by the court instead of by the jury; and in such cases the court shall have jurisdiction to hear and try such cause and render judgment and sentence thereon,"

and it is reported that about 70% of the criminal cases are tried by the court and about thirty per centum by the jury. This question of permitting a person charged with crime to elect to be tried by the court and not by the jury is now being considered in a few states and the merits as shown by the practice in Maryland and Connecticut will doubtless resolve other states to consider the question of whether or not such practice would be applicable to their separate situations. If it be shown that the results are equally accurate and produce a saving of time, expense and dignity, it will doubtless be considered with favor when taken up by the Bench and Bar in the several states. If the Bench and the Bar throughout the states and the nation become convinced of their responsibility to see to it that justice be more speedily and more efficiently administered, the above problems are among those that must be taken up for discussion in the various State Bar Associations as possible means of reaching the end desired.

STATE REGULATION OF BANKING BY GUARANTY OF DEPOSITS

By A. B. Butts, Ph. D. *

(It is believed by the writer of this article that perhaps its publication is timely for the reasons that: First, the Mississippi State Bankers' Association at its meeting on May 15, 1929, adopted a resolution in favor of the repeal of the Guaranty Deposits Law of the state, and appointed a committee of nine bankers to work out plans to be submitted to the legislature of the state; second, this action of the Bankers' Association was taken in view of the status of the guaranty fund at the present time. The condition of the fund as given by J. S. Love, Superintendent of Banks, is described in the following news item of April 21, 1929:

"Since the law became effective, which makes an assessment of one-twentieth of 1 per cent against all deposits in state banks for the guaranty fund, Mississippi has lost 80 banks, says Love's report. Of this number, 47 were by failures, 14 by voluntary liquidation, 11 by nationalization, and eight by mergers and consolidations.

" . . . . .

"The present status of the guaranty fund, declared Love, was as follows: Guaranty certificates now outstanding $4,339,504.72, less cash on hand $335,167.18, realizable assets $1,595,350.07, guaranty assessment now pending $123,000, making total deductions of $2,053,517.88, 'leaving a balance or deficit in guaranty certificates of $2,285,986.60.'

"The banking superintendent declared that to the $2,285,986.64 must be added accrued interest on guaranty certificates now outstanding, which is estimated to be $287,060, and also contingent liability $478,078.85; the contingent liability represents claims now in litigation which, if they must be met by the guaranty fund, would raise the total deficit in the guaranty fund to approximately $3,000,000."—Memphis Commercial Appeal, April 21, 1929.)

During the last two decades eight American commonwealths have enacted bank-deposit guaranty laws.

The state of Oklahoma, on December 17, 1907, put into operation the first of these laws. In 1909 Kansas, Nebraska and Texas adopted bank-deposit guaranty laws; in 1914, Mississippi; in 1915, South Dakota[1]; in 1917, North Dakota and Washington.

It is the purpose of this paper to discuss the Mississippi bank-deposit guaranty law, and the results as shown after an experience of nearly fourteen years in that state.

The history of the guaranty laws in these eight states will show that in each of them a more or less critical situation in the banking business called forth the plan of guaranteeing deposits. In Oklahoma, the first state of the eight to adopt a law guaranteeing bank deposits, the events leading up to the enactment of the law have been well described:[2]

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* Head of Department of Political Science at Mississippi A. & M. College.

1 An optional law passed in 1909; never in effect; new law, 1915.

2 By A. Piatt Andrew, Yale Review, July, 1913, pp. 599-600; quoted by Thomas Bruce Robb, The Guaranty of Bank Deposits, 1921, p. 22.

"The idea was born in Oklahoma in the very throes of the panic of 1907, after the shortest possible period of gestation. The panic, it will be remembered, began October 28, 1907, and it was not until three weeks later, on November 16, that Oklahoma became a state, and that its first legislature began its sessions. Nevertheless the panic was not yet over; currency was still at a premium and clearing-house certificates were still outstanding throughout the country when the Oklahoma legislature passed its famous law. The first legislature of a new state had been in session only four weeks when, on December 17, it adopted with scarcely any debate a law without precedent in any other country, and with but one dimly remembered, unsuccessful precedent in the United States—a law which nevertheless presented what was probably the most far-reaching and drastic experiment in banking legislation that had been made anywhere in the world for at least two generations."

It will not be amiss here to sketch the history of banking in the state of Mississippi, before considering the passage and operation of the bank-deposit guaranty law of that state.

The establishment of the first bank in Mississippi antedates by eight years the admission of the state into the Union. On December 23, 1809, the Territorial Assembly passed an act for the establishment of a bank in the city of Natchez to be officially known as "A body politic and corporate, by the name and style of the President and Directors and Company of the Bank of Mississippi." The bank was accordingly established December 29, 1809, with a capital stock of $500,000 in $100 shares. The life of the bank was to be until 1834.[3]

In 1818 the name of this bank was changed to the Bank of Mississippi, and the Assembly raised the capital stock to $3,000,000, thus making thirty thousand shares available, of which the Governor was to subscribe, on behalf of the State, one for every four subscribed by individuals.[4] The Governor was to appoint five directors, and the life of the bank was to extend to December 31, 1840. In the same sitting the Assembly authorized the establishment of a branch bank at Woodville and one at Port Gibson. The unusual promise was made to The Bank of Mississippi: "No other bank shall be established by any further law of the State during the continuance of the aforesaid corporation, for which the faith of the State is hereby given."[5]

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3 Ency. Miss. Hist., Rowland, Vol. 1, pp. 181-182; also see A History of Banking in All Nations, Sumner, Vol. 1, pp. 60-61.

4 A History of Banking in All Nations, Sumner, Vol. 1, pp. 60-61.

5 Ency. Miss. Hist., Rowland, Vol. 1, p. 182.

This charter and pledge were bitterly criticized by Governor Poindexter in his message of 1821. He protested on the ground that the Assembly had no right to create a monopoly of any business within the State; moreover, he denied the power of one Assembly to pass measures which would curb the actions of subsequent Assemblies. In 1830 the State meantime having become hopelessly in debt, the legislature attempted to have the bank make further dangerous expansions; the Bank of Mississippi refused. Angered by this refusal, the legislature passed an act in February, 1830, creating the Planters' Bank of the State of Mississippi. In so doing the legislature of 1830 ignored the pledge which had been given the Bank of Mississippi in 1818.[6]

The Planters' Bank was to be established at Natchez, with a capital stock of $3,000,000, in shares of $100 each, twenty thousand to be subscribed by individuals. The life of the corporation was to be until 1855. This fact should be noted: the bank was authorized to issue paper money of denominations not under five dollars, *without limit.*[7] The bank was in operation in November, 1831.

The Bank of Mississippi had had an exclusive right to do a banking business in Mississippi for over twenty years, and throughout its career it had been successful; but believing that the state had chartered a new bank under conditions which would possibly, and very probably, lead to wildcat banking, this first bank of Mississippi sought to liquidate. By act of the legislature, December 19, 1831, the authority was granted and the bank soon wound up its business.

In 1832 branches of the Planters' Bank were established at Vicksburg and Rodney. Every month found the State deeper in debt; state bonds to the amount of $1,500,000 were sold in 1833. "The State," says Dr. Rowland, "was now in the throes of boundless speculation, and prices were inflated beyond reason to correspond to a fictitious valuation of land."[8]

Other banks were coming into existence. By act of the legislature in 1835 three combination railroad and banking companies were chartered with an aggregate capital of $7,000,000. In 1836 nine similar corporations were formed with capital ranging from one million to four million dol-

6 Public Administration in Miss. (1919), A. B. Butts, Ch. 111, p. 158.
7 Rowland, Vol. 1, pp. 181-185; also Sumner, Vol. 1.
8 Ency. Miss. Hist., Rowland, Vol. 1, p. 190.

lars.[9] It is not difficult to see the direction of events when the fact is noted that all these corporations issued paper money in profusion.[10]

In 1837 the legislature met in special session in response to a call from Governor Lynch. The Governor hoped that by some curative act matters could be remedied; but with the additional impetus which the opening of the Chickasaw lands had given to wild speculation it was evident that nothing could be done. The great financial crash came in May, 1837, when all the banks of the United States suspended specie payment. Many bank failures were reported during the latter part of 1837. The Union Bank had first been proposed in 1835; and now in the midst of all this trouble came Governor McNutt's proposal for the establishment of such a bank. He succeeded in having the bank established.

The three bank commissioners who had been elected by the legislature in 1837 made their report in 1838. This report gives in detail the absurd principles upon which banks were organized during this period. In part the commissioners said: "The history of civilization affords no evidence of any device so simple and efficient in reducing the country to vassalage as these principles of banking."[11] Professor Sumner corroborates this statement when he quotes the following article from the July, 1839, Free Trader: "Against the banking institutions of Mississippi we find the voice of their warmest and most devoted friends becoming loud, indignant, and denunciatory. Every day only increases public imprecations against their unscrupulous swindling."[12]

Following the report of the bank commissioners in January, 1840, the Act of February, 1840 ended the career of many banks. The Planters' and the Agricultural Banks, with a few others, put their assets in trust before the law was passed.

In 1841 Governor McNutt proposed the repudiation by the State of the Union and Planters' Bank bonds, but no action was taken at that time. In 1853 the question of paying the bonds was referred to the people at the general election. Whether the people thought that, inasmuch as they were alleviating the burden of the State, they were acting on

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9 History of Banking in All Nations, Sumner, Vol. 1; Ency. Miss. Hist., Vol. 1, p. 190.

10 Ency. Miss. Hist., Rowland, Vol. 1, p. 190.

11 History of Banking in All Nations, Sumner, Vol. 1, p. 323; also Raguet's Register, 43, July, 1838; same, 379.

12 Ibid.

sound principles it is impossible to say. Be this as it may, the returns from the election showed that the people were in favor of repudiation.

"The opposition to banks," says Mr. R. W. Millsaps, "was so great that some of the banks that could have weathered through the financial trouble preferred to liquidate."[13] Only three banks[14] survived the panic, and they had confined themselves to a very restricted business.

A bank founded on sounder business principles, the Bank of Britton and Koontz, was established in 1835 at Natchez. It did not issue any paper money, but contented itself in doing a brokerage and exchange business immediately after the failure of the other banks. It survived both panics and the Civil War and continues down to the present time.[15]

Of the period just preceding the Civil War a good description of conditions existing in the banking business in the State of Mississippi is given by Henry V. Poor:

"The $48,000,000 of loans were never paid; the $23,000,000 of notes and deposits were never redeemed. The whole system fell a huge and shapeless wreck, leaving the people of the state very much as they came into the world. Their condition at the time beggars description. Everybody was in debt, without any possible means of payment. Lands became worthless, for the reason that none had any money to pay for them. The only personal property left was slaves, to save which, a number of people fled with them from the state, so that the common return upon legal process against debtors was in the very abbreviated form of G. T. T.—gone to Texas—a state which in this way received a mighty accession to her population."[16]

In 1876 the constitution was amended to prohibit the payment of the bonds of both the Union and the Planters' banks and this prohibition is contained in the present (1890) constitution of the state.[17]

A law was passed in 1888 placing all the banks of the state under inspection.[18] This law supplemented by the

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13 R. W. Millsaps, History of Banking; Rowland, Ency. Miss. Hist., Vol. 1, pp. 181-207.

14 Commercial Bank (Yazoo City), Northern Bank (Holly Springs), Bank of Britton and Koontz (Natchez).

15 Wirt Adams & Co., and Brown, Johnson & Co., were the private bankers of Vicksburg before the Civil War; J. and T. Green and Griffith & Stewart of Jackson. The Columbus Ins. & Bk. Co. (now the First National Bank of Columbus) was established in 1852.

16 Poor, H. V. Money and Its Laws, p. 540; Ency. Miss. Hist., Vol. 1, p. 199.

17 Const. 1890, Sec. 258, Art. XIV.

18 Acts 1888, Ch. 11, Secs. 1, 2, 3, 4.

banking law of 1892,[19] remained in force until the act of March 9, 1914.

Neither the law of 1888 nor the supplementary law of 1892 brought any real supervision of banking. Under the provisions of the law of 1888 all state banks were required to make quarterly reports to the Auditor, and the Auditor was given authority to make requisition upon all banking institutions for such reports, but beyond this meagre means of control the banks remained practically free of any direction from a governmental agency.

In 1888 thirty state banks were operating in the State of Mississippi with an aggregate capital of $1,660,000 and deposits of $4,593,000. In 1894 there were sixty-three banks with an aggregate capital of $3,278,000 and deposits of $5,000,000.[20] Individual deposits in the national banks in Mississippi increased from June 30, 1896 to October 31, 1904, 286 per cent. For the same period the deposits in state and private banks increased 306 per cent.[21]

Since 1890 the banking business in Mississippi has grown very rapidly. The following figures indicate the growth:[22]

Year	No. of Banks	Capital	Deposits	Total Resources
1900	101	$ 4,279,495.88	$ 12,547,102.73	$ 19,345,840.57
1906	263	10,824,813.41	31,650,294.22	57,691,832.05
1912	334	13,128,673.83	51,071,454.69	74,221,609.16
1918	288	9,915,125.00	92,435,752.08	124,373,538.44
1927	313	11,555,930.00	171,668,938.31*	208,380,872.97

In 1907 Dr. Rowland made the following statement: "With one exception there has been no bank failure in Mississippi for the past ten or twelve years, and the total for the past twenty-five years has been very small."[23]

But beginning in 1908 a reaction began, and from 1908 until 1914 this reaction continued with ever-increasing danger to the equilibrium of all forms of business throughout the state.

From 1907 to 1914 there were no less than one hundred bank failures in Mississippi.[24] As compared with this amazing number of failures in Mississippi, it is of interest

19 Acts 1892, Chs. 150-166, inclusive.

20 Bank Commissioners' Reports, 1888, 1894.

21 Quoted from Report of Secy. of Agriculture, Ency. Miss. Hist., Vol. 1, p. 206; of the Secy. Agr. Report, Vol. 1, p. 270.

22 See Pub. Administration in Miss. (1919), Vol. 111, Centen. Series Pub. Miss. Hist. Society, A. B. Butts, p. 163, for figures for each year, 1900 to 1918.

* Biennial Report, Banking Dept., State of Miss., 1926-27, pp. 10 and 25; Oct. 10, 1927.

23 Ency. Miss. Hist., Vol. 1, p. 207.

24 See Auditor's Reports; also 1915 Report, Miss. Banking Dept.

to note the number of failures in other states in which conditions industrially, socially, and politically are similar to those in Mississippi. During this same period in Georgia there were only six bank failures; in Louisiana, eighteen; in North Carolina, eighteen, five of which made arrangements and re-opened at once; in South Carolina, eleven; in Virginia, fifteen; in Oklahoma, thirty-nine; in Texas, eight; and in Florida, four, the largest of which paid its depositors in full with interest.[25]

Beginning in 1908 each year showed more and more agitation throughout the state in favor of strict legislation regulating banks, and a great deal of this agitation came from depositors who had lost money in defunct banks. They wanted a law that would insure deposits. The great number of bank failures, with their accompanying disasters, showed clearly the need of reform in the banking system. Some interest had been taken in the matter by a few members of the legislature, but they had never been numerous enough to secure action. After 1908, however, with the ever-increasing frequency of bank failures in different sections of the state, interest both in and out of the legislature was aroused. Frequent editorials appeared in the papers; bankers and other business men were becoming keenly interested in the serious situation; and, along with this interest of bankers, business men, and the public generally, more members of the legislature were expressing themselves in favor of drastic laws regulating the business of banking. Realizing that some reform was undoubtedly necessary, members of the legislature and others began to study the conditions in order to try to discover some of the causes and, if possible, to find a remedy. No general reason could be assigned for the great number of bank failures. In one case the cause would be due to business depression in a particular section of the state;[26] in another, to unwise business methods of the bank officials; in another, to wildcat banking of the worst type; and in a few instances to looting by some official of the bank.[27] But one thing was quite apparent: no such thing as real centralized supervision existed. The State Banking Department had neither the authority nor the administrative machinery ne-

25 Letters from St. Banking Depts. to the writer, 1915, 1918.

26 See Biennial Report, St. Banking Dept., Miss., 1926-27, p. 11, for opinion of State Supt. of Banks as to reasons for the forty-two bank failures since the Guaranty Law went into effect; the one-crop system of the Delta section an important factor.

27 Ibid., fifteen or sixteen of the forty-two 1914-1927 failures.

cessary to the proper supervision of the banking business of the state.

Before the meeting of the legislature in January, 1914, much had been said of the guaranty of deposits system then existing in Oklahoma, Kansas, Nebraska and Texas. The laws of Kansas, Oklahoma and Texas were frequently referred to as being, in many respects, applicable to the conditions in Mississippi. The Nebraska law was patterned largely after the Oklahoma law; so Mississippi was really looking to all the four laws then in existence. There was growing agitation for reform during the few months that preceded the meeting of the legislature. During January and February while the legislature was in session fourteen state banks failed involving an aggregate loss of no less than three hundred thousand dollars to depositors. It was quite evident that the time was ripe for legislation. Early in this session a proposition for a law regulating banking was received therefore, with much attention; a bill was soon formulated and started on its journey. As is always the case in such matters, the bill was beset with many formidable obstacles, but a law was enacted, which with some important amendments by subsequent legislatures, stands at the present time.

The banking department is supported entirely by assessments against the banks. Each bank is assessed for each year sixty dollars, and every bank whose total assets exceed $100,000 further pays in addition to the minimum assessment of sixty dollars, twenty-five cents for each one thousand dollars or fraction thereof, of assets in excess of $100,000.[28]

Under the terms of the 1914 Guaranty Law, each bank entitled to the certificate of guaranty is required before receiving the certificate from the banking department to "deposit, and at all times maintain with the state treasurer (subject to the order of the bank examiners when countersigned by the auditor of the state) United States bonds, Mississippi State bonds, the bonds of any levee district, or the bonds of any county, township or municipal bonds within the State of Mississippi, to the amount of $500 for every $100,000 or fraction thereof of its average deposits eligible to the guarantee (less its capital and surplus) as shown by its last four published statements, provided that each bank shall deposit not less than $500."[29] It is also provided that

28 Laws of Miss., 1926, Chap. 251, Sec. 24.
29 Laws of 1914, Guaranty of Bank Deposits, Sec. 34.

the bonds, or cash in lieu thereof, shall not be charged out of the assets of the bank, but shall be carried in its assets under a heading "guaranty fund with state treasurer," until such time as the bank shall default in payment of assessments provided for by the guaranty clause of the Act.[30]

Section 35 of the Banking Laws of the State provide for the method of maintaining the guaranty fund, as follows:[31]

"The superintendent shall, during the month of January of each year, or as soon thereafter as practicable, make assessments of one-twentieth of one per cent, of the average guaranteed deposits, less capital and surplus, of each bank (the minimum assessment in any case to be twenty dollars), until the cash fund accumulated and placed to the credit of the bank depositor's guaranty fund shall be approximately five hundred thousand dollars ($500,000.00) over and above the cash deposited in lieu of bonds, when said superintendent shall discontinue such assessment. Should such fund become depleted, the superintendent of banks shall make such additional assessments from time to time as may become necessary to maintain the same; provided, that not more than five such assessments of one-twentieth of one per cent, each shall be made in any one calendar year."

It will thus be noted that in each year five assessments of one-twentieth of one per cent of the average guaranteed deposits, less capital and surplus, of each bank may be made to maintain the guaranty fund.[32] When the maximum of assessments is made in a year, the total amount, therefore, is one-fourth of one per cent of the average guaranteed deposits, less capital and surplus, of each bank.

All state banks in Mississippi are under the guaranty system. Section 38 of the banking laws of the state defines what deposits are guaranteed, as follows:[33]

"All deposits not otherwise secured and all cashier's checks, certified checks or sight exchange issued by banks operating under this law shall be guaranteed by this act. The guaranty as provided for in this act shall not apply to a bank's obligation as indorser upon bills re-discounted, nor to bills payable, nor to money borrowed from its correspondents or others, nor to deposits bearing a greater rate of interest than four per cent per annum. Each guaranteed bank shall certify under oath to the superintendent of banks at the date of each call statement

30 Ibid.

31 Laws of 1914, Guaranty of Bank Deposits, Sec. 35, and Laws 1922, Chap. 172, Sec. 33.

32 In the years 1914, 1915, and 1916 one-fifth of the maximum assessment was collected; in the years 1917 and 1920 two-fifths was collected; in 1918 three-fifths; and 1919 four-fifths. The maximum has been paid by the banks in the years 1921, 1922, 1923, 1924, 1925, 1926, 1927. See p. 3, 1926-27 Rpt. Bk. Dept.

33 See Laws 1922, Chap. 172, Sec. 36.

the amount of money it has on deposit not eligible to guaranty under the provisions of this act, and in assessing such bank this amount shall be deducted from the total deposits."

As would be anticipated, this provision of the law has been the subject of much litigation.[34]

A solvent guaranteed bank, upon retiring from business and liquidating its affairs, is entitled to receive from the state treasurer its bond or money pledged (i. e., the $500 or over deposited before the certificate of guaranty is issued), after all depositors in such bank and all assessments on account of the guaranteed banks in liquidation have been paid in full, but not any part of any unused assessments that may be in the bank depositors' guaranty fund.[35] It was held in *Mississippi Banking Department et al., vs. Adams,* (102 So. 70) that

"when a bank voluntarily liquidates and goes out of business, after having paid its depositors in full, and paid all assessments made against it while it was doing business, it is entitled to recover from the state treasurer all bonds or moneys it has deposited with him, under the provisions of the act."

In *Noble State Bank vs. Haskel,* 219 U. S. 104, 31 Sup. Ct. Rep. 186, 55 L. Ed. 112, the constitutionality of the Oklahoma law guaranteeing deposits by a fund collected from the banks, as under the Mississippi law, was upheld in the following language: "The Acts of December 17, 1907, and March 11, 1909, of Oklahoma, subjecting state banks to assessments for a Depositors' Guaranty Fund are within the police power of the State and do not deprive banks assessed of their property without due process of law or deny to them the equal protection of the law, nor do they impair the obligation of the charter contracts."[36]

In delivering the opinion of the Court Mr. Justice Holmes said:

"We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On

34 Anderson et al., Bank Examiners, vs. Owen et al., 112 Miss., 476, 73 So., 286; Anderson, State Bank Examiner, vs. Wilbourn, 114 Miss., 81, 74 So., 682; Bank of Commerce et al. vs. Clark, Sheriff and Tax Collector, 114 Miss., 850, 75 So., 595; Wardlaw, State Bank Examiner, vs. Planters Bank of Clarksdale et al., 131 Miss., 93, 95 So., 135; Johson, State Bank Examiner, vs. Johson, 134 Miss., 729, 99 So., 369; Anderson, State Bank Examiner, vs. Yates et al., 135 Miss., 110, 99 So., 499; E. F. Anderson, State Bank Examiner, vs. T. E. Gordon, 134 Miss., 639, 99 So., 501; Anderson, State Bank Examiner, vs. Bank of Tupelo, 100 So., 179; Love, Superintendent of Banks, vs. Murry, State Treasurer, 100 So., 277; Pitts vs. Peoples Bank of Baldwin, 102 So., 279.

35 Act of 1914, Chap. 124, Sec. 40.

36 Decided Jan. 3, 1911, affirming 22 Okla., 48.

the contrary we are of opinion that it may go on from regulation to prohibition except under such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong."

On the same day (January 3, 1911) of the Oklahoma decision in *Noble State Bank vs. Haskel,* the United States Supreme Court handed down decisions upholding the constitutionality of the Kansas law[37] and of the Nebraska law.[38] Mr. Justice Holmes delivered the opinions of the Court in all three cases.[39]

The constitutionality of the Mississippi guaranty law was contested before the Supreme Court of the State[40] and the Supreme Court of the United States.[41] In *Bank of Oxford vs. Love et al.,* the Bank of Oxford questioned the authority of the State Banking Department to subject them to the inspection and regulation provided for in the act of 1914, and denied the authority of the legislature to subject them to enforced contribution to the expense of the banking department.

The Bank of Oxford was chartered by special act of the Mississippi Legislature, approved March, 1872, and was authorized to "exercise the privilege appertaining to a general banking exchange and brokerage business, with all the power of a body corporate." Section IV of the act incorporating the bank declares "That the business of said bank shall be confided to and controlled by its stockholders under such rules of laws and regulations as said Company may see fit to adopt, Provided: the same be not in conflict with the Constitution of the United States or of this State." The question considered by the Supreme Court of Mississippi was, Did the Legislature (1872) have the power and authority to grant to the appellant bank, through its charter, immunity and exemption from any reasonable regulations that might thereafter be imposed by the State under its inherent police power? The Court answered that the legislature had no such power.[42]

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37 Assaria State Bank vs. Dolley, Bank Commissioner of the State of Kansas, 219 U. S., 121.

38 Shallenberger, Governor of the State of Nebraska, vs. First State Bank of Holstein, Nebraska, 219 U. S., 114.

39 These three cases argued Dec. 8, 1910; decided Jan. 3, 1911.

40 Bank of Oxford vs. Love et al., 11 Miss., 699, 72 So., 133.

41 Bank of Oxford et al. vs. Love et al., Bank Examiners of the State of Mississippi, 250 U. S., 603.

42 111 Miss., 699.

It is interesting to note that counsel for the Bank of Oxford contended that the police power of the State extends only to matters affecting the public health and public morals; the Supreme Court of the State answered by saying "but we think the authorities have settled the law contrary to the contention of counsel for appellant." Among other cases, the Court cited the Oklahoma[43] and the Nebraska[44] decisions of the Supreme Court of the United States.

On the points raised in the Bank of Oxford case the State Supreme Court said: "No legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."[45] And, "the police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."[46]

As to extending the police power to the regulation of banking business, the Supreme Court of Mississippi quotes from the opinion of Mr. Justice Holmes,[47] as follows:

"It may be said in a general way that the police power extends to all great public needs: Canfield vs. U. S., 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably a few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

The Supreme Court of the United States affirmed the decision of the Supreme Court of Mississippi. Mr. Justice McReynolds delivered the opinion of the Court,[48] holding that

"A provision in the special charter of a state bank that its business shall be confined to and controlled by its stockholders under such rules as it may adopt, not in conflict with the Constitution of the United States or of the State, is not inconsistent with the exercise of the general power of the State to cause the affairs of such bank to be examined and reported on by the

43 219 U. S., 104.
44 219 U. S., 114.
45 Stone vs. State of Miss., 101 U. S., 814.
46 219 U. S., 104.
47 219 U. S., 104, at p. 111.
48 Bank of Oxford et al. vs. Love et al., Bank Examiners of the State of Miss., 250 U. S., 603.

state officials and to exact a reasonable annual assessment (1/40 of 1 per cent of the total assets) for the maintenance of the state banking department; and a general law, so operating, does not impair the contract obligation of such special charter."

The Guaranty Banking Law of Mississippi has now been in effect about fourteen years. For the first five or six years of this period the plan seemed to produce the results its authors intended to achieve. Confidence was greatly restored; deposits increased remarkably;[49] with only five bank failures[50] in this period, depositors of the failed banks were promptly paid.

No abnormal conditions were encountered during the period 1914 to 1920, however, and the more serious testing time for the plan of deposit-guaranty did not come until the first period of stress came in 1920. There have been forty-two bank failures since 1914.[51] Thirty-seven of these failures have come since 1920. The Superintendent of Banks reports that thirteen failures resulted from the 1920 disturbances.[52] "In 1920," the Superintendent says, "there was a sudden and decided falling off in land values and in the market price of agricultural products. There was a general disturbance of financial conditions but the bank failures in this state that resulted were due mainly to the violent changes in the land and cotton markets. This change affected more adversely the banks in the Delta section where a large percentage of the securities is based upon land and cotton. The ill effects of this disturbance were aggravated by the succeeding three or four years of bad and indifferent crops, as well as unfavorable markets. The banks that suffered losses, many of them, were not able to continue operation through the lean years until normal conditions should return when their losses might be repaired."[53]

The year 1926 added greatly to the aggregate of outstanding guaranty certificates, due mainly to the "small returns on crops in the year 1926, resulting from the low production and low prices."[54] That year was as disastrous as the year 1920. "The conditions told mainly upon the banks located in the great single-crop section of Mississippi; banks that had never recovered from the 1920

49 Dec., 1915, 281 state banks, total deposits $54,936,519.54; Dec., 1917, 285 banks, total deposits $107,375,767.68; Feb. 21, 1919, total deposits $130,907,490.04.

50 See p. 177, note 70, Pub. Adm. in Miss., Vol. 111, Centen. Ser. Miss. Hist. Soc.

51 Report, Miss. Banking Dept., 1926-27, p. 11.

52 Ibid., p. 4.

53 Report, Banking Dept., 1926-27, p. 4.

54 Ibid., p. 7.

falling off in land values; banks that had weathered one disaster but succumbed to the second."[55]

It should not be concluded, however, that bad economic conditions are responsible for all the forty-two bank failures that have come about since the adoption of the guaranty law. Some of the failures were due to inefficient banking methods; over one-third of them were due to criminal activity of bank officials. On this point the Superintendent of Banks in his 1926-27 report says:[56]

"Especially have we undertaken to bring about a more vigilant and active supervision of Boards of Directors. Nothing is more important than this. Of the forty-two failures since 1914, fifteen or sixteen were occasioned by criminal activity on the inside. These banks thus brought to ruin were small banks dominated, or at least managed, by one man without a functioning Board of Directors. This condition is not found in large banks that make Directors' meetings occasions of importance, where the Directors seem to more fully appreciate this responsibility, keep better informed as to the bank's business, and who discharge their duties more nearly as the law directs."

It would seem that the guaranty plan in Mississippi is now confronted with a situation similar in many respects to what has happened in some of the other seven states where the plan of deposit-guaranty has been adopted.[57] The guaranty fund on December 31, 1927 was in arrears $1,565,-733.22, which amount does not take into account certain contingent liabilities nor accrued interest on guaranty certificates amounting to about $189,000; this latter amount brings the total amount of possible arrears to $1,754,-733.22.[58]

As to the cost to the banks of the guaranty plan,[59] and also in reference to the status of the guaranty fund, the Superintendent of Banks reports as follows:[60]

"Since 1914 the banks have contributed to the State Bank Depositors Guaranty Fund $2,208,275.70. In the years 1926 and 1927 they paid $589,714.84. The guaranty certificates outstanding December 31, 1925, amounted to $1,486,785.28. There were at that time assets belonging to the Fund of the estimated value of $747,613.55. The Guaranty Fund at that time had suffered a deficit of $960,266.31. At December 31, 1927, there were certificates outstanding amounting to $3,470,006.78, an increase

55 Ibid., p. 8.
56 Ibid., p. 11.
57 See Federal Reserve Bulletin, Sept., 1925, 11 Fed. Res. Bull., pp. 626-640; ibid., pp. 641-668, for digest of the laws of the eight states that have adopted deposit-guaranty acts.
58 Biennial Report, State Banking Dept., 1926-27, p. 7.
59 See Fed. Res. Bulletin (note 57, above) for facts in other states.
60 Biennial Report, State Banking Dept., 1926-27, p. 7.

over December 31, 1925, of $1,982,997.89. The estimated value of assets coming from failed banks and available for the liquidation of the outstanding certificates is $1,904,273.56, leaving the Guaranty Fund in arrears $1,565,733.22. This shows an increase in the deficit of $605,466.91. This does not take into account certain contingent liabilities nor accrued interest on guaranty certificates amounting to about $189,000.00."

It seems beyond question that the guaranty fund under the Mississippi plan is threatened with disaster on account of principally two causes: first, the one-crop system of farming in the Delta section of the state (comprising about one-fourth of the state), and secondly, the criminal activity of officers and employees of banks; for the Superintendent of Banks is authority for the statement that the forty-two banks that have failed since the enactment of the Guaranty Law, thirteen [61] failures were due to the fall in land values[62] and small returns on crops,[63] and that fifteen or sixteen of the failures were due to "criminal activities on the inside."[64] That is to say, these two causes account for two-thirds of the failures. Ordinary negligence and mismanagement will account for some of the failures.

The Superintendent of Banks states that "it seems quite clear that the contributions to the Guaranty Fund now being made by the banks are sufficient only to take care of the demands put upon it under normal conditions."[65] He says further:[66]

"The fund thus supported will protect the depositors of banks that fail on account of dishonest and criminal conduct on the part of officers and managers and of those banks that fail because of ordinary negligence and mismanagement: meaning by this description to include those that suffer from causes peculiar to themselves and not from sudden occasional disturbances that may not be anticipated, conditions general in their nature, affecting all banks operating under similar conditions. This category would include seventeen of the thirty failures in the eleven and one-half years. In the second place it is equally clear that the fund is not sufficient to carry the plan successfully through periods of stress and panic."

The Superintendent of Banks believes that "under no circumstances should there be any increase in assessments."[67] He believes that "assessments large enough to

61 Biennial Report of the Banking Dept., 1926-27, p. 4.
62 Ibid., pp. 4, 5.
63 Ibid.
64 Ibid., p. 11.
65 Ibid., p. 5.
66 Ibid., pp. 5, 6.
67 Biennial Report, State Banking Dept., p. 9.

support a fund that would meet the demands arising out of such extraordinary conditions or to liquidate more rapidly the existing liabilities would be too large for the banks to bear."[68] He says further: "It would not only be unjust, in fact, but unwise in policy to increase the burden on the banks. An increase would strengthen the Guaranty Fund but would weaken it as well since it would drive many banks to the National System."[69]

Looking to the possibility of reducing the number of bank failures caused by criminality of officials, the Superintendent recommended to the 1928 Legislature as follows:[70]

"The Department should be given some specific authority to incur the expense of employment of a Special Agent, or detective, or examiners, or attorneys, for the ferreting out of crime and the prosecution of persons who by their criminal conduct have brought disaster to a bank. At least one-third of the failures occurring since the present law has been in force are directly attributable to criminal misconduct of men in the banks."

The Legislature of 1928 responded by enacting a law giving the Superintendent of Banks the right to employ a Special Agent, with a view to running down and convicting defaulters of bank criminals.[71]

Violent changes in the land and cotton markets will continue to place the banks of the Delta section of the state in a precarious condition, for there, always a large percentage of the securities is based upon land and cotton. Bad and indifferent crops and unfavorable markets for cotton, especially if these conditions prevail for more than one year at a time, make a condition extremely difficult for the banks of the section.

Ordinary inefficiency and mismanagement of small banks will occur to some extent in spite of the best efforts of the State Banking Department to prevent these things.

The 1914 deposit-guaranty law of Mississippi most certainly has resulted in great improvement in the banking business of the state, even though the guaranty feature is now in a very unstable situation. Besides restoring confidence and bringing about large increases in deposits, thereby encouraging business development in the state, the work of the State Banking Department in addition to its inspectional work has done much constructive work with the banks of the state. The Superintendent of Banks refers to

68 Ibid., p. 6.
69 Ibid., p. 6.
70 Ibid., p. 12.
71 Laws of 1928, Banks and Banking.

some of the important work done by the Department when he says:[72]

"The supervision is more rigorous and thorough than it has been before, due to the provisions in the 1922 laws, authorizing the employment of a larger force and creating the office of Superintendent of Banks. We are striving to eliminate dangers due to one-man responsibility in banks; to require directors to perform their duties as the law prescribes; to compel the managers to observe the safeguards written into the law; to keep the fidelity bonds of officers and employees in regular form; to encourage efficiency and discourage loose and reckless banking. We are making a persistent effort to give effect to every provision of the law."

Starting from the chartering of the first bank in 1809, it seems not incorrect to say that the phases of the banking business in Mississippi may be logically grouped into five distinct periods: (1) The period from 1809 to 1888, or the strictly "laissez faire" period; (2) the progressive period from 1888 to 1908, with very little administrative supervision by state officials; (3) the downward period from 1908 to 1914, with the astonishing number of bank failures, and still no effective means of control by state administrative agencies; (4) the prosperous period following 1914, the time of the enactment of the Guaranty Law, until the present time, throughout which period there has been a high degree of state supervision and control; (5) the period from 1920 to 1928, a highly prosperous period in the banking business generally in the state, but a period which has brought the deposit-guaranty feature of the 1914 Law to a situation in which the Guaranty Fund is burdened with such an extraordinary loss that it will require years to liquidate under normal conditions.

It is interesting to note that nearly a century ago "New York State initiated its experiment with a safety-fund law, covering deposit liabilities along with all debts of banks—although the plan was devised particularly for the protection of note holders rather than of depositors."[73] The experience there was similar to the experience of several states under their guaranty laws since 1907; for under the New York law no failures of safety fund banks occurred for a period of some twelve years; then in the course of a few months, on account of a succession of bank failures, ob-

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72 Biennial Report, State Banking Dept., 1926-27, p. 7.

73 Federal Reserve Bulletin, Sept., 1925, 11 Federal Reserve Bulletin, p. 625.

ligations piled up against the fund considerably in excess of its immediately available resources.[74]

If a state is to administer successfully a bank-deposit insurance plan it must take into account the fundamental bases upon which any successful insurance system must rest. This is precisely what has not been done by the states adopting the deposit guaranty laws.

To begin with, some of the banks that were taken in under the guaranty-plan should have never been admitted; they should have been liquidated instead. Insurance companies do not insure any and all property on a blanket-premium basis, nor do they insure for the full amount of losses in many instances. Fire insurance companies will indemnify only actual loss, and often they insert the so-called three-fourths value clause which further restricts the amount which may be collected on any loss.

The social forces that insurance sets at work in other fields is seen as a result of deposit-insurance. Preventive work for life extension; stricter building laws, better fire-extinguishing facilities, and the like, follow the extension of fire insurance; better industrial safety follows compensation insurance; better care of the sick and convalescent follow the enactment of health insurance laws. Every state that has adopted bank-deposit guaranty laws has greatly raised its banking standards. Writing in 1921 Dr. Thomas Bruce[75] Robb states: "Ten years ago Oklahoma had about the lowest banking standards in the country; today, almost wholly because of the pressure of the guaranty law on the state bankers, no state in the Union probably has better regulated state banks."

The banks are as much the beneficiaries of bank-deposit insurance, of course, as are the depositors. The interest of the one group is likewise the interest of the other group. It was, for example, contended by some advocates of the bank-deposit guaranty plan that it would prevent panics; that idea came from the confusion of "panics" with "runs" on banks. Bank-deposit guaranty will not prevent a panic or financial crisis; it will unquestionably in many instances prevent a "run" on a bank.

It is impossible to devise by law a plan which will prevent incompetent and unscrupulous men from wrecking banks. The guaranty laws require banks mutually to insure their deposit liabilities against this hazard. "Banking in-

74 Federal Reserve Bulletin, Sept., 1925, 11 Fed. Res. Bull., p. 626.
75 The Guaranty of Bank Deposits, p. 192.

stitutions," says Dr. Robb, "gather in the funds that the public is temporarily not using and lend to private parties the credit which the bank erects on this foundation. Because of their intimate relation to the public, banks have become quasi-public institutions. The state in throwing safeguards around these institutions can make banks as safe as the men who run them. It is the personal element in banking which causes the trouble. The law requires of each banker that he be honest and the possessor of good judgment, and the state employs bank examiners and other officials to ascertain these qualities. But no laboratory method has been devised by which to determine without the possibility of error the good judgment or the honesty of men. The average individual is helpless in protecting himself from this quarter. He may have a choice as to where he will deposit, but the fact remains that he must deposit somewhere. The fact that expert bank examiners, and even the directors themselves, are often deceived shows that this freedom of choice is an empty consolation to the individual."[76]

Bankers look upon banks first of all as sources of profit. They are quick to assert that bank guaranty laws perpetrate injustice upon the bankers. They are fond of asking the question whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. The United States Supreme Court says that this is a futile question,[77] and it would certainly on the most casual investigation seem to be; for it must be borne in mind that banking is not a wholly private business. It is impossible to escape the fact that the interests of the bank and the public are peculiarly bound together. There is little merit in the contentions of bankers that the business of the good should not be taxed to pay for the bad; that ability should not be taxed to pay for incompetency; that honesty should not be taxed to pay for dishonesty; that experience should not be taxed to pay for inexperience; that knowledge should not be taxed to pay for the mistakes of ignorance.[78]

The whole matter is a question of public policy. It should be approached from the angle of mutual gains from

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76 The Guaranty of Bank Deposits, pp. 179-180.

77 Noble State Bank vs. Haskell, 219 U. S., 104, 110, 112.

78 See Guaranty of National Bank Deposits (pamphlet), Forgan, p. 3; quoted by Robb, p. 193, wherein a Chicago banker lists the stock objections held by many bankers.

insurance, so far as the banker is concerned. On this point, Dr. Robb has well said:[79]

"This question of the justice of a compulsory guaranty assessment raises the whole question of the mutual gains from insurance. Because of some temporary responsibility an individual may insure his life for a term of years. If he survives this period it is far from the truth to say that his insurance premium represents a dead loss to him. He wanted temporary protection for some object that was dependent on him, and he cheerfully paid for what he got. So with a bank. An insured bank may prove to be solvent over a period of years, but in the meantime the bank has given to its creditors a very real protection from those forces that might have wrecked it. But the insured bank gains in a yet wider sense. As Governor Cruce has well said, every bank is vitally interested in the stability of financial and commercial conditions. . . . All banks of the state gain from the stabilizing effects of this insurance."

Both parties, the banks and the public, unquestionably gain from deposit insurance.[80] There can be little difference of opinion as to the desirability of giving deposit-credit security and stability; there can logically be differences of opinion only as to the methods to be employed to attain this end. It is a most difficult problem. In this age of insurance, by deposit-guaranty laws, the principles of insurance have been extended to this field of human risk. It is submitted that when the problem is recognized purely as a problem of insurance and the fundamental principles of insurance are properly applied, the plan of deposit-guaranty will produce the results that it is intended to achieve by such a system.

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79 The Guaranty of Bank Deposits, Robb., pp. 197-198.

80 See Guaranty of Bank Deposits, Robb, p. 198, for suggestion that since both the banks and the public are large beneficiaries, both should help bear the costs. The proposal to create the guaranty fund in part from a general tax levy has much to be said in its favor, Dr. Robb asserts. He adds, "But before these costs can be equitably distributed, more attention must be paid to three considerations, namely, (1) to what extent the banks profit from such a law by having their deposits increased, (2) to what extent the cost has already been shifted to the public, and (3) the extent of the other mutual gains from insurance. These are hard questions, but they serve to indicate that this whole matter of the justice of bank guaranty is far more subtle and complicated than has often been supposed."

MISSISSIPPI'S "ODD AND CONFUSED STATUTE"[1]

By Sydney Smith*

In 1822 the Legislature enacted a statute styled "An Act Concerning Conveyances," Chap. 104, Revised Code of Miss., 1823, which I think, as did the court in *Carroll vs. Renick,* 7 S. & M. 799, and *Kirby vs. Calhoun,* 8 S. & M. 462, was intended to displace the common law rules of conveyancing and to substitute therefor the rules embodied in the statute and "thereby put an end to the numerous distinctions and almost endless refinements of the English law on this subject, and to furnish a rule of construction at once simple, obvious and intelligent." *Kirby vs. Calhoun, supra.*

In *Powell vs. Brandon,* 24 Miss. 344, and *Jordan vs. Roach,* 32 Miss. 481, the old High Court of Errors and Appeals assumed, and those cases were decided on the theory, that the statute was merely amendatory of the common law. This view of the statute was thereafter consistently adhered to by that court and has been adhered to by its successor, the present Supreme Court. As late as 1904, however, this view of the statute was challenged, and in *Banking Company vs. Field,* 84 Miss. at page 665, it was said by Chief Justice Whitfield: "It may further be conceded that it would have been wiser if this court had originally construed this statute, as intended, as a substitute for all common-law rules to which its provisions can apply, instead of as merely amendatory of the common law; but for us it must be enough that the long line of contrary decisions has become now crystallized into a rule of property." In both of which statements I thoroughly concur.

The harm which resulted from this departure from the legislative purpose of displacing the common law rules of conveyancing is strongly exemplified by the judicial history of the 24th section of the statute which now appears as Sec. 2765, Code of 1906, Hemingway's 1927 Code, Sec. 2424. This section of the statute as originally enacted read as follows:

"Every estate in lands or slaves, which now is, or shall hereafter be created an estate in fee-tail, shall be an estate in fee simple; and the same shall be discharged of the conditions annexed thereto by the common law, restraining alienations

1 So designated in Gray on the Rule against Perpetuities.

* Chief Justice of the Supreme Court of Mississippi.

before the donee shall have issue, so that the donee, or person in whom the conditional fee is vested, or shall vest, shall have the same power over the said estates, as if they were pure and absolute fees: Provided, That any person may make a conveyance, or demise of lands to a succession of donees then living, and the heir or heirs of the body of the remainderman, and in default thereof, to the right heirs of the donor in fee simple."

Afterwards the word "demise" was changed to "devise." In 1857 the section was further amended so as to reduce the number of donees then living to two and now reads as follows:

"Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee-simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee-simple."

The second clause of the section has been a prolific source of litigation, and, as I shall undertake to show, serves no good purpose and should be either repealed or materially amended. At common law a grant to a named person and the heirs of his body created a conditional fee which became absolute on the birth of issue, but in default thereof, the property reverted to the grantor or his heirs. The rule that such an estate became absolute on the birth of issue was changed by the statute de donis conditionalibus under which the property continued to descend to the specified heirs until they became extinct. The effect of this common law rule and statute was to take property out of commerce and to build up a landed aristocracy. The English and American courts have uniformly proceeded on the theory that the public interest requires that property be not removed from commerce for an unreasonable length of time, with which theory the legislature of 1822 was evidently in accord when it enacted the section of the statute here under consideration. That section was intended to accomplish two purposes. First, to prevent the creation of conditional fees and estates-tail, and second, to provide a substitute therefor. It is true that in 1807 the Legislature excluded all English statutes from any operation in this state, unless re-enacted, but it had not then been judicially declared that estates-tail could not be here created, and without the statute de donis conditional fees could be created. The Legislature, therefore, decided to take no chances in the matter and expressly provided by the first

clause of the 24th section of the statute that language appropriate for the creation of either of these estates should create an estate in fee simple.

The second clause of the section provides for a succession of donees, but in order that property may not be taken out of commerce limits this succession to the death of a person in being at the time of the grant or devise. When the statute was enacted the rule against perpetuities had not been judicially declared to be in force in this state, but that rule evidently served as the inspiration for the limitation in the statute on the time within which the fee in property conveyed to a succession of donees must vest. The rule embodied in the statute, as originally enacted, differs, insofar as a succession of donees is concerned, from the rule against perpetuities in only two respects. First, under the statute the ultimate fee must vest not later than the death of a person in being when the grant or devise was made, while under the rule against perpetuities an interest in property is good, provided it vests, if at all, not more than twenty-one years and ten months after a life in being when the interest was created. Second, the statute requires the person in whom the fee shall vest on the death of a person in being when the grant or devise was made to be one of two classes, that is, an heir of the remainderman, or an heir of the donor. But the rule against perpetuities contains no such requirement. I am aware that in *Cannon vs. Barry,* 59 Miss. 299, the term of twenty-one years was added to the time within which the fee must vest, but the statute does not so provide, and the Legislature did not so intend if it was its purpose in enacting the statute to displace the pertinent rules of the common law.

The harm which the second clause of the statute produces results from two of its present provisions: first, the limitation of the donees then living to two, and the requirement that the third donee in whom the fee must vest must come from one of two classes. The limitations in the statute are of public value only insofar as they restrain the taking of property out of commerce for an unreasonable time, and if this time is not exceeded the number of persons who own and possess the property is of no consequence to the public and to restrict such persons to two unduly hampers a land owner who desires his property, under certain contingencies, to be enjoyed within a reasonable time by more than two donees. For instance, where a father with a limited amount of property has several children whose welfare he desires to promote, there is no good reason why he

should not be permitted to provide that his property shall be used and enjoyed by each of those children in succession, provided only the property is not thereby withdrawn from commerce for too long a period of time. An examination of the judicial history of the statute will disclose that the limitation of the donees to two has avoided many a family settlement that was socially and morally good, and which violated no real public interest.

The limitation of the third donee to one of a particular class also unduly restricts the right of a grantor and serves no good purpose for the public can have no sort of interest in whom the ultimate fee in the property shall vest, its interest is only that the fee shall vest within a reasonable time. The apparent conflicts and inconsistencies in the results reached by the Supreme Court in applying this statute to grants and devises were evidently brought about by the fact that the Court in each instance was striving to prevent a harsh and inequitable statute from avoiding grants and devises that violated no real public policy.

In the interest of justice and fair play the second clause of the statute should be repealed or materially amended. Should it be repealed the estates there permitted could be created under the common law, and other present statutes, and the rule against perpetuities effectually prevents the creation of an estate to vest beyond the life of a person in being and twenty-one years and ten months thereafter. If a statutory rule on the subject is preferred, the second clause of the statute could be amended so as to read in substance as follows:

"But any person may make a conveyance or a devise of lands to a succession of donees then living and to any person in fee simple, which fee simple must vest, if at all, within twenty-one years and ten months after the death of a person living when the conveyance or devise was made" (or if preferred, "within twenty-one years and ten months after the death of the last preceding donee").

WHICH HAS PRIORITY OVER THE RAILROAD AND HIGHWAY GRADE CROSSING?

By A. T. Stovall*

The public and the railroads, too, want information on this question. The rights of both are involved, and they have not been effectively declared by any statute in Mississippi, nor has the Supreme Court of Mississippi laid down a rule that the layman can understand. It is far from clear in Mississippi whether the railroad train has the prior right at the highway grade crossing, or whether the vehicle has priority. It is certain that both cannot have the right to be on the railroad and on the highway at a grade crossing at the same time. Then which has the priority? Which must stop for the other to prevent a meeting on the crossing? From the nature of the situation, which can afford to stop for the crossing with less expense and less inconvenience?

When two railroads cross each other at a grade crossing without an interlocking or derailing device, the statute provides that neither can cross the other's track without coming to a full stop and sounding a signal, and in some instance, opening a gate. If either railroad fails to do this, it is liable to the other for all damages resulting therefrom; so says the statute. Why should not the Legislature of Mississippi say as much when it is dealing with vehicles on a highway and trains on a railroad track at grade crossings? Let us do something to stop the loss of life and the waste of money which result from the uncertainty as to who has the prior right to pass over the crossing. One must have that right to do this, and the other must stop. Which one has the right and which one should stop? The answer is, the one that can do so with less inconvenience to the public, and less expense and risk, and the easier and quicker. Which one is that? The vehicle driver, of course, because there are usually only three or four people in any vehicle; while a passenger train would have many times that many. If the vehicle is a freight carrying truck, it will have only a ton or so; while the freight carrying train would have several hundred tons; and then, too, the vehicle can stop in a

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shorter distance, and can vary its course. The vehicle is dealing with local traffic, but the train is carrying the commerce of a nation. In other words, there is every reason, arising from the interest, the property, and the people involved, why the vehicle should stop; but if the Legislature or the Supreme Court will say that the train should stop, then it should stop. It is not right that life and property should be jeopardized as it is now by both cherishing an illusion as to equality of right on the crossing.

A recent accident is illustrative of the popular confusion. In a Mississippi town the track of one railroad for a mile or so is substantially parallel with the track of another, and their tracks are about seventy-five yards apart. Both tracks are crossed by a street of the town. A lady, with a friend and his sweetheart as her guests, was driving the fateful Ford coupe into town by way of the aforesaid street. It was the Fourth of July, and the party had imbibed not wisely but too well, in glorification of the nation's birthday. They safely passed over the crossing of the first railroad, but while going over the crossing of the other the coupe was overturned by a train. It was somewhat disfigured, but, fortunately, the occupants escaped with injuries of no consequence. When the first aid parties arrived at the scene, and pulled the occupants out of the wreckage, the lady driver was indignant and loquacious, and as her lawyer had not arrived to teach her discretion, she angrily exclaimed: "Why, I blew my horn for that train when I passed over the crossing!" She was typical of thousands of Mississippians who fervently believe that priority at grade crossings, as between the trains and the Fords, is wholly dependent on which cuts loose with the first toot.

The traveling public would not stand for a railroad train to stop at all grade crossings. It would hinder railroad travel so that the public would not be able to transact its business. The public would demand that the question be settled by the Legislature, and settled by giving railroad trains the priority. In fact, it did demand that it be settled sometime ago, and the Legislature in 1924 undertook to fix their relative rights, but some unwise or selfish interest killed the effect of the law by a proviso that if the vehicle driver did violate the law by refusing to stop, he should not be deprived of a recovery of damages for his failure to stop, or his negligence. In other words, the substance of the legislation is merely a warning, the effect of which was to subject the railroads to many hundreds of

thousands of dollars expense for putting up road crossing signs, announcing the law to "Stop," but giving them no substantial benefit for the outlay. The Supreme Court of the United States has had no difficulty in determining a true rule for that Court, in the case of *Baltimore & Ohio Railroad Company vs. Dora Goodman, Administratrix,* Volume 72, U. S. Supreme Court Report Law Edition 167, and Volume 275 U. S. Sou. Report 66. In that case that great and courageous Court said:

"When a man goes upon a railroad track, he knows that he goes to a place where he will be killed if the train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances, it seems to us that if a driver cannot be sure otherwise, whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precautions, he does so at his own risk. If at the last moment Goodman found himself in an emergency, it was his own fault that he did not reduce speed earlier, or come to a stop."

This whole matter could be remedied by the Legislature saying which shall stop, the vehicle or the train. And if that one did not stop which the statute designated to stop it should suffer the consequence. If the public were taught by that which is logical, that the railroad has priority and that a failure to recognize that priority would invariably prevent a recovery it would be of the greatest benefit in saving life. People would learn to be careful. They would know before they crossed, that they crossed at their own risk.

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NOTE AND COMMENT

Delay for a Shorter Period of Time Than the Statutory Limitation Constituting Laches and a Bar to Relief.—The maxim "equity aids the vigilant, not the indolent" is one of the best known of judicial apothegms. Time and again a court of equity, which is never active in relief against conscience or public convenience, has refused its aid to stale demands, where the party has slept on his rights, and acquiesced for a great length of time. It is and always has been the practice of courts of equity to remain inactive, where a party seeking their interference has been guilty of unreasonable laches in making his application. "A court of equity will not aid the slothful." It will not take from him who has been diligent what he has gained by his diligence and turn it over to him who has lost by his inaction. A claim worthy of support in equity must be asserted in a reasonable time, or relief will be refused, et cetera. In any case involving equity jurisdiction, this philosophy of conscience has been most prolific.

The doctrine of laches, which has as its basic structure this maxim, is also well recognized. It is well to recall, however, that "laches" in legal significance, is not mere lapse of time, whether greater or less than the precise time of a statute of limitations; it is delay for such time as makes the doing of equity either impossible or doubtful, as involves the inequity of permitting a claim to be asserted after death of parties, change of title, or intervention of the rights of others, where in consequence, evidence has been lost or becomes obscured, the discovery of truth is made difficult, and the party attached is placed in a position of evident disadvantage. (*Abraham vs. Ordway*, 158 U. S. 417.)

Closely related to the subject of laches is the matter of statutory limitations as applicable to suits in equity. Herein lies a question which seems to be truly illustrative of the quintessence of equity—a court of conscience; the consideration of when a delay shorter than the period of limitation allowable at law will be decreed laches, and a bar to relief, though the action is brought within the statutory period.

Courts of equity, in cases of concurrent jurisdiction, generally consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy, because, where the legal remedy is barred, the spirit of the statute bars the equitable remedy also. In many other cases they act upon the analogy of the like limitation at law. It is understood, of course, that in those cases where no statute of limitation governs, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere when there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. In litigation wherein the statutory limitation is applicable, some of the statutes are drawn in terms which permit of no distinction between actions at law and equity; while

provisions of others are not so comprehensive. This condition of the law has left much for judicial interpretation, so that the rules as to the application of the statutes are not always entirely clear though the general tendency seems to be in the direction of giving effect to the positive law. It is by no means to be understood, however, that either positive statutory limitation, or the rule of analogy followed by courts of equity, or the doctrine that they follow the law, operates as an elimination of the doctrine of laches. On the contrary, it is held that a statutory period of limitation of equitable actions is not, where a purely equitable remedy is invoked, equivalent to a direction that no shorter period shall be a bar to relief in any case, and does not preclude a denial of relief for unreasonable delay, in accordance with equitable principles. In such a case, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. (Ruling Case Law, Vol. 10, p. 407.) The matter under consideration is very clearly stated in Corpus Juris, as follows: "Mere lapse of time short of the statutory period of limitations does not bar relief, and it has been held that where the statute of limitations has been made applicable in terms to suits in equity, a suit may be begun at any time within the prescribed period, notwithstanding the intermediate laches of the plaintiff. By the weight of authority, however, relief may be denied, although the statutory period has not elapsed, where there has been inexcusable delay, and special circumstances exist which would render it inequitable to enforce the right, the burden of showing the existence of such circumstances being on the defendant." (21 C. J. 256.)

Conversely, for a period longer than statute of limitations: "limitation by statute is a purely legal in contradistinction from an equitable defense, and although courts of equity will ordinarily act in obedience and analogy to the statute, yet they will also in proper cases interfere in actions at law to prevent the bar of the statute where it would be inequitable and unjust. In short, equity makes the statute controlling in the absence of proof of special circumstances showing its strict application would work injustice and wrong. The persuasiveness of the statute acquires the force and effect of absolute law unless the equity of such an application of the rule is made clearly apparent." (2 Story's Equity Juris, Paragraph 1521.) This note, however, will be a brief review only of those cases wherein a delay short of the statutory period constitutes laches, and a bar of relief.

One of the most prominent and leading cases in which relief was denied, although the statutory period had not elapsed, is that of *Patterson vs. Hewitt*, decided by the Supreme Court in 1904 on an appeal from the Supreme Court of New Mexico. In this litigation, the owners of a mining claim transferred their interest therein to one of their number as trustee, who was to retransfer to each owner contributing his share of development expenses for a year, a one-eighth interest in the mine. The plaintiff, one of the owners, contributed his share and demanded a deed which the trustee refused to give. Plaintiff made no further demands and did not contribute any more to the expenses. The trustee and the other owners continued to develop the claim, and finally succeeded in locating a very valuable body of ore. Eight years after the former demand, the plaintiff commenced an action in equity to enforce the original trust. There was a statute in New Mexico limiting actions concerning real estate to ten years, and the plaintiff contended that this pre-

vented equity from applying the doctrine of laches for a delay short of that period. Mr. Justice Brown delivering the opinion of the Court *held;* that persons having claims to mining property in the course of development are bound to the utmost diligence in enforcing them, and in such cases the doctrine of laches is relentlessly enforced; that the refusal by the trustee of the demand to retransfer plaintiff's share was a repudiation of the trust, and opened the door to the defense of laches; that a delay of eight years by the plaintiff in asserting his right—during which time large sums of money were spent in the development of the property, which the plaintiff had knowledge of—was inexcusable and unpardonable laches, thereby barring the plaintiff's right of recovery. Quoting the Court:

"If this were an action of ejectment at law, no doubt it could be maintained, since it was brought within the ten year statutory period, but where the statute is in terms applicable to suits in equity, as well as at law, it is ordinarily construed, in cases demanding equitable relief, as fixing a time beyond which the suit will not under any circumstances lie, but not, however, as precluding the defense of laches, provided there has been unreasonable delay within the time limited by the state. In an action at law, courts are bound by the literalism of the statute, but in equity the question of unreasonable delay within the statutory limitation is still open, and the defendant may avail himself of the laches of the complainant, notwithstanding the fact that the time fixed by statute has not expired." (*Patterson vs. Hewitt,* 195 U. S. 309.) (See also: *McQuiddy vs. Ware,* 17 Wall 91; *Sullivan vs. Railroad Co.,* 94 U. S. 807; *Manning vs. Hayden,* 16 Fed. 645; *Kline vs. Vogel,* 1 S. W. 733; *Scruggs vs. Decatur Mineral and Land Co.,* 86 Ala. 173; *Calhoun vs. Millard,* 121 N. Y. 69.)

In the case of *Humphreys vs. Welsh* is found the following pronunciation of law by the Federal Courts:

"In applying the doctrine of laches in equity actions, federal courts are not bound by the statutes of limitations of the forum, even when such statutes are applicable by their terms to such actions. Although in actions at law, the federal courts are bound by the liberalism of statutes of limitations, in equity the question of unreasonable delay within the statutory limitation is still open, and is to be determined by the circumstances of each particular case; and even where a statute of limitations exists, and has been made applicable in general terms to suits in equity, the defendant may avail himself of the plaintiff's laches, though the time fixed by the statute has not expired." (248 Fed. 414.)

The thorough recognition of this doctrine by the federal judges is seen again in the case of *Ide vs. Trorlicht, Duneker and Renard Carpet Company.* (U. S. C. C. A., Mo.)

"The doctrine of laches is an equitable principle which is applied to promote, but never to defeat justice. Under ordinary circumstances, a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous statute of limitations at law. But if unusual conditions, or extraordinary circumstances make it inequitable to allow the prosecution after a briefer, or to forbid its maintenance after a longer period than that fixed by the statutes, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. (See also: *Societe Fonciere vs. Mulligan,* 135 U. S. 304; *Oil Co. vs. Marbury,* 91 U. S. 587.) Some of the circumstances which will induce a court of equity to apply the doctrine of laches in a shorter time than that fixed by the statute of limitations are the destruction of muniments of title, the death or removal of parties, the number of innocent purchasers who may be affected, radical changes in the condition and value of property, and its speculative character. (*Lemoine vs. Dunklin Co.,* 51 Fed. 487.)

The case of *Alsop vs. Bicker* (155 U. S. 461), is another strong case on this subject. The Court in rendition of opinion said:

"The case is one peculiarly for the application of the rule that equity, in its exercise of its inherent power to do justice between the parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations. The length of time during which a party neglects the assertion of his rights which must pass in order to show laches in equity, varies with the peculiar circumstances of each case and is not subject to an arbitrary rule."

An interesting case is that of *Bobb vs. Wolf*, decided in 1899 by the Supreme Court of Missouri (49 S. W. 997). The grantor, in this case, made an absolute conveyance of his property in 1884. Two years later, upon the grantor's alleged claim that the deed was intended and executed as a mortgage, the grantee offered to let him purchase or redeem the property, which offer the grantor disregarded. Realizing the rapidity with which the property was increasing in value, the grantor sat by and slept upon his alleged right of redemption until the day before the ten year statute of limitation expired, when he sued to have the deed declared a mortgage. In the interim, the property had greatly increased in value, the grantee had died, and his estate settled. *Held,* that the inexcusable laches of the grantor alone, without regard to the validity or invalidity of his alleged equity of redemption, would defeat him. "Courts of equity have inherent power to refuse relief after undue and inexcusable delay, independent of the statute of limitations."

In *Preston et al. vs. Jeffers,* (200 S. W. 54), a case in which the subscribers of a corporation who had executed notes, failed to act within a reasonable time after having had ample opportunity to discover that fraud was the inducing element in their contract, were deemed guilty of laches, and could not—as against creditors of the corporation who had changed their position by reason of the delay—claim relief, although their action was not barred by the statute of limitations. The Kentucky Supreme Court said:

"It is a rule of equity not to encourage stale claims, even though they may not be barred by the statute of limitations, especially when to do so would work a loss to innocent parties who relied on the non-existence of such claims, being induced to do so through laches of the one seeking to rely upon them."

"If one fails to bring suit until after the expiration of the period prescribed by the statute of limitations, he is necessarily barred from maintaining his action; but he may, nevertheless, in certain cases in equity be barred by laches for a period much shorter than the statutory period of limitations due to failure to bring his case promptly, or to prosecute it diligently. The reason for the application of the doctrine of laches to cases of recission for fraud is that the failure of the party defrauded to act promptly is conclusive evidence of his ratification of the contract, the doctrine of laches becoming a part of the equitable remedy in such cases. (*Culton vs. Asher,* 149 Ky. 659.)

It may be readily seen from the cases adjudicated on this subject that by the weight of authority, relief may be denied, although the statutory period has not elapsed, where there has been inexcusable delay, and special circumstances are involved which would render it inequitable to enforce the right. The few states that do not concur in this ruling are usually governed by an imperative statute on the subject. Mississippi, one of the states holding against the decided weight of authority, is directly governed by the following statute:

"Whenever there be concurrent jurisdiction in the courts of common law and in the courts of equity of any cause af action, the provisions of this chapter (Chap. 46) limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought

for the same cause of action in a court of chancery.'' (Hemingway's Mississippi Code 1927, section 2662.)

In the small number of cases that have come up in Mississippi wherein laches for a period shorter than that of the statute of limitations has been the pertinent question, the statute has been construed as allowing a suit to be begun at any time within the statutory period, notwithstanding the intermediate laches of the complainant.

In the leading Mississippi case involving this question, *Hill vs. Nash, et al.,* decided in 1896, (73 Miss. 849), Mr. Justice Woods of the Supreme Court said:

''There is no such thing as a stale claim, properly so called, in Mississippi; and by positive law the statute of limitations is to be applied in our courts of equity as in our courts of law. No claim is barred until the limitation of statute has accrued, and the fact that on account of the laches of the complainants their proceedings lack but a few days of being barred is no defense to a bill to remove a cloud upon their title. With us no claim is barred until the limitation of the statute has accrued.''

In *Westbrook vs. Munger et al* (61 Miss. 329), the court held that no delay short of the time fixed by some statute of limitation, will bar a creditor seeking enforcement of his claim against the estate of a decedent. Quoting the Court from *Taylor vs. Chickasaw County,* (70 Miss. 89). ''A claim not barred by the statute of limitations is not a stale claim. Because of the existence of the statute, staleness is no defense.'' Mississippi, due to the implicit and imperative language of the statute, holds, against the weight of authority that a suit may be begun at any time within the statutory period, not withstanding the intermediate laches of the complainant.

LEONARD E. NELSON.

Interstate Rendition—Was it Meant to be Obligatory?—Interstate rendition is becoming more and more a subject of vital interest. State executives are refusing to permit the return of fugitive criminals with increasing frequency. An interesting case arose in 1928 when the Governor of Ohio denied extradition in the case of a Mississippi prisoner on the ground of the bad lynching record of the state. In view of the increasing importance of interstate rendition it will perhaps be of value to study its constitutional history.

Interstate rendition of criminals is based upon Article IV, Section II, of the United States Constitution. ''A person charged in any state with treason, felony, or other crime who shall flee from justice, and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.'' Until the year 1860 when the case of *Ex Parte Kentucky vs. Dennison,* was decided, Chief Justice Taney writing the opinion, it had been the general belief that the rendition clause in the Constitution was obligatory and compulsory and the governor of a state was compelled to issue a requisition when asked. Kent said, ''I am not aware that there has been any judicial opinion on this provision. And as it stands, I should apprehend that, on the demand being made and documents exhibited, no discretion remains with the Executive of the state to which the fugitive had fled, and that it is his duty

to cause the fugutive to be arrested and surrendered.''[1] Sedgwick, in his *Constitutional Law,* said, ''It confers no right; it is the regulation of a previously existing right. It only makes obligatory upon every member of the Confederacy the performance of an act which previously was of doubtful obligation.''[2]

In the light of this belief and the subsequent decision of Chief Justice Taney, it is necessary that we attempt to discover the attitude of the framers of the Constitution toward the rendition clause. Did they intend that the duty resting on each state to return fugitives from justice should be optional or compulsory?

We find in the Articles of Confederation the following provision: ''If any person guilty of or charged with treason, felony, or other high misdemeanor in any state shall flee from justice and be found in any of the United States, he shall, upon demand of the Governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense.''[3] The first report we have in the Constitutional Convention is the report of the Committee of Detail. Seemingly the committee adopted the provision made by the Articles of Confederation for the rendition of criminals with only a slight change in wording. As reported by the Committee of Detail, it read, ''Any person charged with Treason, Felony, or high misdemeanor who shall flee from justice and be found in any of the United States shall on demand of the executive power of the state from which he fled be delivered up and removed to the state having jurisdiction of (the tr.) the offense.''[4] Madison gives the discussion raised in the convention when this section was voted upon. ''Words 'high misdemeanor' were struck out and 'other crimes' inserted in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited. Mr. Butler moved 'to require fugitive slaves and servants to be delivered up like criminals.' Mr. Wilson, 'This would oblige the Executive of state to do it at the public expense.' Mr. Sherman saw no more propriety in the public seizing and surrendering a slave or servant than a horse. Mr. Butler withdrew his proposition in order that some particular provision might be made apart from this article.''[5] The article was unanimously passed by vote of the convention with the desired correction. Butler did not give up his plan for the return of fugitive slaves, as may be determined from the next report which was made by the committee of style. For the first time we find added to the clause for the rendition of fugitive criminals another clause which later was to cause certain pious souls to say that the Constitution was a ''Contract with the devil.'' ''If any person bound to service or labor in any of the United States shall escape into another state, he or she shall not be discharged from such service or labor in consequence of any regulation subsisting in the state to which they escape; but shall be delivered up to the person justly claiming their service or labor.''[6] I draw attention to the intro-

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1 Kent's *Commentaries on Constitution,* Vol. I, p. 642.
2 Wallare, *Taylor vs. Taintor,* Vol. 16, p. 366.
3 Thayer, *Cases on Constitutional Law,* Vol. I, p. 400.
4 Farrand, *Records of Federal Convention,* Vol. II, p. 187.
5 Farrand, *Records of Federal Convention,* Vol. II, p. 187.
6 Farrand, op. cit., Vol. II, p. 577.

duction of this clause; the United States Supreme Court in the case of *Prigg vs. Pennsylvania,* discusses the relation these two clauses bear to each other.

The rendition clause must have had an accepted meaning in the minds of the framers of the Constitution. I was unable to find a reference to it in the Federalist or in the letters of Madison or Washington. The only direct reference to the fourth article, made by one of the framers of the Constitution, that I discovered was made by Charles Pinckney. "The fourth Article respecting the extending of the rights of the citizens of each state throughout the United States; the delivery of fugitives of justice upon demand, and the giving full faith and credit to the records and proceedings of each is formed exactly upon the principles of the fourth Article, of the present Confederation, except with this difference, that the demand of the Executive of a state for any fugitive, criminal offender shall be complied with. It is now confined to treason, felony, or other high misdemeanor; but as there is no good reason for confining it to those crimes, no distinction ought to exist, and a state should always be at liberty to demand a fugitive from its justice, let his crime be what it may."[7] It has already been stated that the Convention changed the words "high misdemeanor" to "other crimes."

In 1790 the State of Virginia failed to deliver certain fugitives upon the demand of Governor Mifflin of Pennsylvania. Governor Mifflin brought the facts before the President and the Act of 1793 was the result.[8] This Act provides: "That whenever the executive authority of any state in the Union, etc., shall demand any person as a fugitive from justice of the executive authority of any such state or territory to which such person shall have fled and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging such person with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the demanding state, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear, ..." etc.[9]

The United States Supreme Court had occasion to interpret the fugitive labor clause in the case of *Prigg vs. Pennsylvania,* and in this case they laid down certain rules of interpretation. "Perhaps, the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights with all the light and aids of contemporary history; and to give to the words of each just such operation and force consistent with their legitimate meaning as may fairly secure and attain the ends proposed. It cannot well be doubted that the Constitution requires the delivery of fugitives upon the claim of the master; and the natural inference certainly is that the national government is clothed with the appropriate authority and functions to enforce it. There are two clauses in the Constitution upon the subject of fugitives which stand in juxtaposition with each other and have been thought mutually to illustrate each other. How then are

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7 Farrand, Op. cit., Vol. III, p. 112.
8 Howard, *Ex Parte Kentucky vs. Dennison,* Vol. 24, p. 66.
9 Howard, Op. cit., Vol. 24, p. 66.

we to interpret the language of these clauses? The true answer is in such manner as consistently with the words shall fully and completely effectuate the whole object of it. If by one mode of interpretation the right must become shadowy and without any remedial power adequate to the end; and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends when another construction equally accordant with the words and the sense thereof will enforce and protect them.''[10] This was an opinion rendered by Story, and Taney rendered a dissenting opinion to Story's conclusion that the states did not have a right to legislate upon the subject of fugitives.

It is necessary at this point to study the political affiliation of Judge Taney and his political beliefs. We must not overlook the fact that in any consideration of the duties of the Court, or the judicial conduct of its members as expressed in opinions on constitutional law judges still hold their political views upon the bench, and especially is this true of appointments to the United States Supreme Court which from its foundation have always been largely partisan. Taney, like his predecessors, even when clothed with the judicial ermine was not exempt from the effect of the political convictions of a lifetime. He was an appointee of Andrew Jackson and believed firmly in the rights of the individual and the rights of the states. He did not believe in the federal government encroaching upon the rights of those states.[11] His belief in States Rights may partly solve the question as to why he upset the belief of over fifty years of the state executives in the decision of *Ex Parte Kentucky vs. Dennison.*

The Act of Congress declares that after demand is made ''it shall be the duty of the executive authority of the state,'' etc. Justice Taney while admitting that the words ''it shall be the duty'' in ordinary legislation imply the assertion of the power to command and to coerce obedience; yet held that in this instance, looking at the relations which the United States government and that of the several states bear to each other, the words were not mandatory and compulsory, but declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. He bases this conclusion partly upon the argument that under the Constitution the Federal Government has no power to impose on a state officer any duty and compel him to perform it. Justice Taney closes his opinion by saying, ''It would seem when the Constitution was framed, and when the law was passed, it was confidently believed that a sense of justice would insure a faithful execution of this constitutional provision for every state had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be the duty'.''[12]

The ''United States Code Annotated,'' published in 1928 by West Publishing House, does not give another case in which the particular point has

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10 Peters, *Prigg vs. Pennsylvania,* Vol. 16, p. 539.

11 The Green Bag, *Taney, Chief Justice of U. S.,* Vol. 22, p. 156.

12 Howard, Op. cit., Vol. 24, p. 66.

been raised that was decided in *Kentucky vs. Dennison.* However, we find many references to it as dicta in many cases. A case decided by Justice Horlon in 1906 says, "If a fugitive from justice is found in another state the fugitive must be delivered up by the Governor to the state whose laws are involved. Such is the command of the Supreme Law of the land, which may not be disregarded by any state. While a state should take care within the limits of law that the rights of its people are protected against illegal action the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state. Whether the party is really a fugitive is a question of fact which the Executive decides. Whether his decision may be judicially reviewed is a question on which there is no authoritative decision."[13]

The Texas Court in 1910 stated, "This clause is equally binding on each state and its officers for its faithful execution as though it was a part of the constitution of each state whether Congress had passed laws relating thereto or not."[14] Quoting from a New Jersey case, "If demand be made in due form and the requisite documents exhibited the duty to surrender becomes purely ministerial. Under such circumstances to refuse to authorize extradition is a clear infraction of the Constitution. I think it therefore indisputable that the Constitution has made the surrender of a fugitive from justice a rule of law of perfect obligation and entirely imperative in its character."[15]

It would seem that, with the growing tendency toward an increase of federal powers, if the question which was decided in *Kentucky vs. Dennison,* should again arise there might be a chance that the Supreme Court would reverse the decision of Justice Taney.

LYDA GORDON SHIVERS.

Privileged Communications.—In the recent case of *Provident Life and Accident Company vs. Jemison,* 120 So. 836, the Supreme Court of Mississippi holds as follows:

"Provisions of insurance contract requiring insured, as condition precedent to any liability of insurer, to furnish insurer with a report in writing from attending physician or surgeon, held not to constitute a waiver of statutory privilege against introduction of physician's testimony without consent of patient."

The statute being construed in this case is Section 7455, Hemingway's Code of 1927, which is as follows, to-wit:

"COMMUNICATIONS PRIVILEGED.—All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient."

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13 U. S. Reports, *Applegard vs. Mass.,* Vol. 203, p. 222.
14 Southwestern, *Ex Parte Bergman,* Vol. 130, p. 174.
15 New Jersey Law Reports, Vol. 32, p. 146.

The Supreme Court of Mississippi in construing this statute seems to have gone to the extreme limit in its various decisions. (1).

It is true that that Court has held in *Sovereign Camp, etc. vs. Farmer,* 116 Miss. 626, 77 So. 655, that where one of the considerations upon which an insurance policy was issued was the waiver by the insured of such privilege, physicians were competent witnesses concerning the condition of his health, even though they obtained their knowledge thereof while treating him professionally.

Again in the two cases of *Estes vs. McGehee,* 133 Miss. 174, 97 So. 530; and *Dabbs vs. Richardson,* 137 Miss. 789, 102 So. 769; that Court held that a physician could testify as to facts and information derived from social or business relations and not by professional relations; and further that a physician could testify as an expert witness to facts and circumstances based upon relations and conversations with a testator, derived solely from business and social relations, disconnected and segregated from the relation of physician and surgeon and could give his opinion based upon these facts as to testamentary capacity.

A careful review of all these authorities, however, evinces the determination of that Court to strictly enforce and enlarge the provisions of the statute recognizing no implied waivers of same whatsoever.

Under the common law, disclosures to a physician in his professional capacity were not privileged.

The first enactment of such a law, the privilege being of statutory origin, was in New York in 1828. Since that time about half of the states of the Union have enacted similar statutes. Since all of such statutes, including the one in Mississippi, are in derogation of the common law they should be strictly construed (2) and it seems passingly strange that this Mississippi statute should be by its Supreme Court construed so as to embody the extreme lengths to which that great Court has gone.

In the relationship, for instance, between insurers and insured, the same Court has vigorously seized upon and enforced waivers and estoppels against such insurers (3). But nowhere have any implied waivers been enforced as against the privileged communication statute.

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1. *Y. & M. V. R. R. vs. Messena,* 109 Miss. 143, 67 So. 963; *Hamel vs. Southern R. Co.,* 113 Miss. 344, 74 So. 276; *U. S. F. & G. Co. vs. Hood,* 124 Miss. 548, 87 So. 115; 15 A. L. R. 605.
McCaw vs. Turner, 126 Miss. 260, 88 So. 705.
Davis vs. Elzey, 126 Miss. 789, 88 So. 630; 89 So. 666.
Hunter vs. Hunter, 127 Miss. 683, 90 So. 440.
Watkins vs. Watkins, 106 So. 753.
Metropolitan Life, etc. vs. McSwain, 115 So. 555.

2. *Potter vs. Fidelity Deposit Co.,* 101 Miss. 823, 58 So. 713; *McInnis vs. State,* 97 Miss. 280, 52 So. 634; *Hopkins vs. Sandidge,* 31 Miss. 668; *Dibrell vs. Dandridge,* 51 Miss. 55.

3. *Agricultural Ins. Co. vs. Anderson,* 120 Miss. 278, 82 So. 146; *New York Life Ins. Co. vs. Smith,* 129 Miss. 544, 91 So. 456; *Caledonian Fire Ins. Co. vs. Shepard,* 111 Miss. 175, 71 So. 314; *Franklin Fire Ins. Co. vs. Franks,* 145 Miss. 494, 111 So. 135; *Scottish Union & Natl. Ins. Co. vs. Wylie,* 110 Miss. 681, 70 So. 835.

Dean Wigmore, in his masterpiece on evidence, vigorously contends that such waiver should be implied as against such privilege and that, upon principle, waiver in express language is not necessary. (4).

Furthermore, Dean Wigmore holds:

"A waiver is to be predicated, not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege." (5).

The underlying logic and reasoning upon which the statutes creating this privilege in the various states of the Union is denounced by Dean Wigmore, he characterizing such privilege as "a clever legerdemain loaned by the law to the parties to suppress the truth." (6).

His reasoning seems to be sound and why such a fetish should be made of this statute by not applying the doctrine of waiver and estoppel and construing it strictly as in derogation of the common law cannot be readily apprehended.

According to the discussions of this statute, said to have been recently had at the various meetings of the Mississippi State Bar Association, the underlying reasons why the statute is assailed and upheld are not complimentary to the medical profession. Those lawyers representing plaintiffs in damage suits contend that physicians employed to treat, at the corporations expense, injured employees minimize as much as possible the injury.

Those lawyers representing defendants in such damage suits, protesting against the statute maintain that injured employees seek out and find ignoble members of the medical profession who greatly exaggerate and enlarge on the extent of such employees injuries.

There are doubtless grounds for each position, due largely to the great latitude which a doctor has in giving an opinion.

If the rationale of the rule is the modesty of the patient and his desire that his infirmities not be made public, which is frequently asserted, then certainly such ground is swept away, when the patient himself, in great detail, in his declaration sets forth such pains and injuries to his mind and body. It would appear that by such making public of his ills and making an issue of same, the privilege of physicians who have treated him is thereby impliedly waived. Especially this would seem to be true when the injured party litigant himself places some physician or physicians who have treated him on the stand in his behalf. Certainly this statute in some instances amounts to a denial of justice and truth.

A most interesting and illuminating article was recently written by a distinguished member of the Mississippi Bar, attacking, and it appears to the writer, demolishing the grounds upon which these privilege statutes are enacted. (7).

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4. *Wigmore on Evidence* (2nd Ed.) Sec. 2388, page 219; *Wills vs. National Life Acct. Ins. Co.*, 28 Mo. App. 497; *Knepper vs. Knepper*, 103 Ohio St. 529; *University of Cincinnati Law Review*, March, 1929, p. 229.

5. *Wigmore on Evidence* (2nd Ed.), Sec. 2388, Note 7, page 220; *Cincinnati Law Review*, March, 1929, page 231.

6. *Wigmore on Evidence* (2nd Ed.), Sec. 2389, page 224.

7. Article of Hon. C. L. Garnett addressed to Code Commission of Mississippi and appearing in Jackson Daily News of date August ...., 1929.

Certainly the Texas statute forbidding, as privileged communications, testimony of physicians as to venereal disease seems to be based on logical grounds. (8).

The Pennsylvania statute forbids such testimony of physicians "which shall tend to blacken the character of the patient" without the consent of said patient, except in civil cases brought by the patient, for damages on account of personal injuries. (9).

The Oklahoma statute forbids such testimony as privileged "provided that if a person offers himself as a witness, this is a consent to examine on the matter." (10).

Would it not be fair to both the plaintiff and the defendant in damage suits to provide by statute for the presiding judge on the trial of such cases to appoint a disinterested physician, of high standing in his profession, giving him authority to examine the injured person, if living, and investigate the history of the case from the patient himself and any physician who may have attended him and report to the court the result of his findings? Such statute could provide that in case of a venereal disease report not be made of such fact.

Such exception might not tend to justice, however, in some cases where the existence or non-existence of a venereal disease might be the issue before the court.

It appears manifest to the writer that, as construed by the Supreme Court of Mississippi, the existing Mississippi statute should be changed.

To what extent should the changes go? Upon what basis should the privilege be founded? Should the doctrine of waiver and estoppel be extended by express enactment by statute and if so under what circumstances. By curing the ills which now exist would greater ills be created?

The Code Commission of Mississippi, now preparing the new Code to be submitted to the Legislature of 1930, may well give out of their great learning, ability and ingenuity serious thought and careful consideration to a solution of this problem.

W. CALVIN WELLS, JR.

Bloodhound Evidence in Mississippi.—I, The Bloodhound.—In connection with the evidence of this particular type, it is well for us to think about a few of the most interesting facts pertaining to this prodigy called the bloodhound. This dog is probably of the stock from whence come all the stock of English hounds.[1] The exact date when they were first used in the pursuit of criminals is a matter only of surmise. They were used certainly in the time of the Romans in the pursuit and hunting down of human beings. They were known for the first time in America some years before the Revolutionary War, and were used greatly from the time of the discovery of

8. Article 4445, Acts 4th C. S. 1918, page 179.

9. Act of June 7, 1907, P. L. 462, Section 1; *Skruch vs. Metropolitan, et al.*, 284 Pa. St. 299.

10. *American Bankers Ins. etc. vs. Hopkins*, 67 Okla. 150, 169 Pac. 489; *City of Tulsa vs. Wicker*, 42 Okla. 539, 141 Pac. 963.

1 Encyclopedia Brittanica.

America down to the time of the Civil War, in tracking fugitive slaves. The particular brand used for this purpose seems to have been the Cuban bloodhound, perhaps of Spanish origin.

It seems that these animals possess a peculiar ability in the field in which they are used. They are able to track human beings under most adverse conditions and situations. Once they are given the scent of the person whom they are to hunt down, they have all that is needed for that purpose. It matters not how many rains have fallen, nor whether the ground has frozen since the time the criminal or other person has left the scent, the bloodhound is able to follow it down to its end. It matters not how many other persons have crossed the trail left, nor how many have followed the trail, and finally have left it, they are able to distinguish any one scent from all others, and will not likely branch very far off from the trail left for them. They have been known to swim across streams in pursuit of their quarry, queer and unbelievable as it may seem. They quest slowly and carefully, and when they have left or when they lose the scent, they turn around and go backward until they recover it, and then proceed to a fresh attempt to follow it.

The bloodhound is not the type of animal that most of us were taught to think of him in our childhood. The real bloodhound was not a vicious animal. The vicious character that is found often in the so-called bloodhound of today is brought about by a mixture of the pure bloodhound with some other variety of dog. One thing that we were taught about them was that it was necessary that several men accompany them, holding them back, because, otherwise, once they found their quarry, they would pounce upon him and tear him to pieces, before help could be gotton. According to all reports the disposition of the bloodhound is not of this nature at all. He seems to realize that his duty in life is to go in quest of the human being, and not to attempt to take him under control, once he is found. They bark at the quarry, once he is found, and perhaps lean upon him, but the real bloodhound seldom bothers his prey.

Interesting stories have come to us about their use in England prior to the year 1872. They were used there very widely by the shepherds for the trailing of sheep thieves, and also in the large forests of that country where poachers gave trouble. We find accounts of them in Sir Walter Scott's poems and in the old legends, of border wars between England and Scotland, in which the hunting of fugitives by bloodhounds forms a very dramatic feature.[2]

Mississippi Cases Involving the Evidence.—Few cases are available from our Supreme Court on the weight, relevancy, etc., of the evidence secured through the means of the bloodhound. It seems that the courts of the State are prone rather to doubt the advisability of using this evidence very largely. A few cases give us interesting points on the subject.

A. Can a person accused of crime be convicted solely on the evidence of bloodhounds?

In the case of *Carter vs. State,* 106 M. 507, the appellant was found guilty of breaking into a store, between the hours of seven and ten at night. About ten o'clock that night, the owner of the store found that his store had been broken into and that some goods were stolen. He immediately sent for blood-

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2 The Outlook 40:90.

hounds, and, awaiting their arrival, stationed guards around the building so that the traces might not be bothered.

About thirty-two hours thereafter the dogs arrived, and were put on the trail, and followed it to the appellant's house. The appellant was arrested, tried in due course, and sentenced to prison for a term of one year for burglary, the evidence convicting him being solely that of the dogs.

REED, J., delivered the opinion of the Court, and said in part:

"Such evidence may be deemed a circumstance to be considered in connection with other proof, and in determining the guilt or innocence of the accused; there must be other and human testimony to convict. In this case, there was an entire failure by the State to produce affirmative proof to justify the verdict of guilty."

In the case of *Scott vs. State,* 108 M. 464, which is very similar to the *Carter* case, *supra,* the bloodhounds were the only evidence used by the State, and, in introducing and putting this evidence before the Court, failed to show that the dogs were started at the spot of the commission of the crime, and on an appeal, the case was reversed, on that fact together with the fact that the defendant was not shown to have been connected with the burglary, other than by the testimony of the bloodhounds.

It is seen by these cases that no defendant or person accused of crime can be convicted on the testimony of bloodhounds alone, but must have some human testimony in addition thereto. Why is this rule so laid down? It can be largely attributed to the type of service rendered by the dog. The matter of proof as to the dog's breed, as to his training, and as to his past successes, are things that must be clearly proved, and when they have been proved, there is always the danger that the track on which the bloodhound has been set is not the track left by the criminal in leaving, and oftentimes crowds have gathered around the scene of the crime, and the trail left by the criminal cannot be distinguished from that left by others, who have gathered through curiosity. However, with the above restriction, the use of such testimony is of great value in criminal law. If it could be fully established that such dogs can and will follow a human being unerringly, they might be used to advantage, and often are so used, to capture criminals who would otherwise escape.

B. What Predicate Must be Laid for This Evidence?

The case of *Pedigo vs. Commonwealth of Kentucky,* 103 Ky. 41, 42 L. R. A. 432, is followed largely and cited largely in the Mississippi cases bearing on this subject. Part of its opinion is as follows:

"After a careful consideration of this case by the whole court, we think it may be safely laid down that in order to make such testimony competent, even when it is shown that the dog is of pure blood and of a stock characterized by acuteness of smell and power of discrimination, it must also be established that the dog in question possessed these qualities, and has been trained and tested in their exercise in the tracking of human beings, and that these facts appear from the testimony of some person who has personal knowledge thereof. We think that it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances clearly tend to show that the guilty party had been, or upon a track which circumstances indicated to

have been made by him. When so indicated, the testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he has been accused. When not so indicated, the trial court should exclude the whole testimony in that regard from the jury. It is well known that the exercise of a mysterious power not possessed by human beings begets in the minds of many people a superstitious awe, like that inspired by the bleeding of the corpse at the touch of the supposed murderer, and that they see such a direct interposition of Divine Providence in aid of human justice.''

By this case and the Mississippi cases following it we see the requisites to be proved as a predicate for the introduction of such testimony.[3]

1. The dog must be proved to be of pure breed.

2. He must be proved to have been well trained and tested in tracking other men.

3. The track from which the dog tracked to the accused was made by the person who committed the crime.

Still another requisite is laid down in another Mississippi case, that the dog must be shown to have been put on the track at the place where a crime was committeed, shortly after its commission, and that they followed it to the home of the accused and identified him.[4]

These are all important and not one of them is unreasonable or even harsh on the person or party attempting to get the evidence before the jury. If the dog is not pure bred, and if he be pure bred, and have not been trained and tested thoroughly, no one should hope to use the evidence so produced to convict a man. The evidence would be as silly as if a man were tracked down and identified by a poodle dog so far as the weight and importance is concerned. Again, the dog should have been placed on the trail near or at the scene of the crime, not too long after the commission, and the track must be proved to have been where the criminal was situated when he committed the crime.

KERMIT R. COFER.

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3 *Harris vs. State*, 143 M. 102; 108 So. 446.
4 *Jack Spears vs. State*, 92 M. 613; 46 So. 166.

RECENT IMPORTANT DECISIONS

RAILROADS—ELECTRIC CARS.—RATE OF SPEED.—This suit was brought seeking the value of two head of cattle alleged to have been killed by defendant railroad company's negligence. Proof shows that the cattle were killed within the corporate limits of the city of West Point by a motor car of the defendant, operated by electricity, and running at a rate of speed greater than six miles per hour, this being the statutory limit, above which negligence is conclusively presumed and liability arises on part of railroad for any damage occasioned therefrom. *Held*—Law limiting speed of locomotives and cars operated by steam through cities, towns, and villages, held inapplicable to train propelled by electricity. *Calvert vs. Mobile & O. R. Co.*, 121 So. 855.

This case brings to mind, in an interesting way, convincing facts of human progress and the need of new statutes governing modern inventions. As far as could be found, this is the first and only case in Mississippi on this question. The determination of this case was based, primarily, upon the wording of the Mississippi statute under which it was brought. (Hem. '27 Code, Section 7894, 1906 Code, 4043.) "Any railroad company having the right of way may run locomotives and cars by steam through cities, towns, and villages, at the rate of six miles an hour and no more; and the company shall be liable for any damages or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater speed than six miles an hour through any city, town, or village. The railroad commission shall have power to fix and prescribe limits in cities, etc., in which railroad companies may run locomotives and cars by steam at a greater rate than six miles per hour, and whenever it shall have fixed and prescribed such limits in any city, etc., this section shall not thereafter apply to the running of cars and locomotives by steam within the same." By the wording of the statute "running . . . . by steam" so effectively narrows down the meaning of the statute that it leaves a large loop hole for those classes of motor cars running by crude oil, gasoline, and electricity. These cars, although of the same size, approximately, and fully as capable of doing as much damage as a steam driven car, are not controlled by the statute. The interesting question arises; are the electric and gasoline cars on railroads to be classed different from the steam driven ones, and allowed privileges and immunities greater than steam cars? From the construction of the above statute, they are and until some appropriate legislation is passed on the subject, they evidently will be.

T. H. CAMPBELL, JR.

AUTOMOBILES—LIABILITIES OF MANUFACTURERS OR SELLERS.—John Myers was driving a Ford truck when the cuff broke on the truck, causing it to run into a ditch, killing the driver. His relatives brought this suit against the Ford Motor Company, charging that the death of the deceased was caused by

the defendant negligently constructing the truck from defective material, which was from its nature dangerous to life and limb. *Held*—that the manufacturer of a car is not liable for the death caused by negligence in construction of automobiles, where there is no contractual relation between the parties, as an automobile is not a dangerous instrumentality per se. *Ford Motor Co. vs. Myers, et al.*, Sup. Ct., of Miss., 117 So. 362.

The basis of the decision is that a manufacturer is not liable to a third party with whom he has no contractual relations for injuries resulting from a defective construction of the article. The Mississippi courts committed themselves to this view in the following cases: *Kilcrese vs. Galluty Motor Co.*, 115 Sou. 193; *Vicksburg vs. Holmes*, 63 Sou. 454; *Potts Auto Co. vs. Westbrook Elevator Co.*, 107 Sou. 553.

The other basis for the decision was that an automobile is not a dangerous agency per se, to which principle the Mississippi court committed itself in *Vicksburg Gas Co. vs. Ferguson*, 106 Sou. 258.

The leading case sustaining the principal case is *Huset vs. Threshing Machine Co.*, 120 Fed. 865, which held that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in construction of articles he handles. Three exceptions being (1) where negligence in preparation of the article would be eminently dangerous to human life, as drugs or food; (2) where the owner invites injured person to use his negligently constructed articles; and (3) where manufacturer delivers an article which he knows to be dangerous to human life without informing the other party.

The opposing view is set out in *MacPherson vs. Buick Motor Co.*, 217 N. Y. 382, and *Johnson vs. Cadillac Motor Co.*, 261 Fed. 878, which cases held that an automobile was a dangerous instrumentality, and that the manufacturer who negligently constructed one was liable for any injury accruing therefrom to a person with whom it had no contractual relations.

JASON H. FLOYD.

Automobiles—Negligence.—A merchant of Aberdeen ran his automobile into a ditch three miles from Aberdeen, whereupon he secured the defendant, a garage man, to bring his wrecker to his aid. The operations to get the car out of the ditch consumed several hours, during which time the front of wrecker was at the very edge of the ditch in which was the car, and the rear end projected practically across the road. In this state of affairs, at night, the plaintiff, in a car belonging to his father and at the time being driven by a guest, ran into the wrecker. This is a suit to recover damages for personal injury. The evidence conclusively showed that the wrecker was well lighted, though this fact was controverted. The evidence was contradictory regarding the speed of the plaintiff's car, and the distance that the wrecker was from a curve which was in the immediate vicinity. The jury returned a verdict for the defendant, and judgment was entered accordingly, from which judgment this appeal was prosecuted. *Held*—that the judgment be affirmed. *Duke vs. Mitchell*, (Miss., 1929), 122 So. 189.

All the cases, in absence of statutory regulation, agree that the owner of a vehicle which is standing on the highway is bound to exercise reasonable care that it will not constitute a source of danger to other users of the highway. 42 C. J. 1007; *American Express Co. vs. Terry*, 126 Md. 254, 94 Atl. 1026; *Seibert vs. A. Goldstein Co.*, 99 N. J. L. 200, 122 Atl. 821; *Kastler vs. Tures*, 191 Wis. 120, 210 N. W. 415. The principal case in support of the above decision, and which is under an analagous statement of facts is that of *Kastler vs. Tures*. The action was brought by the owner of the service truck for injury sustained to his truck when the defendant ran into it. The injury was occasioned at night, and the facts are practically identical to the case of *Duke vs. Mitchell*. Judgment was awarded the plaintiff owner of the wrecker, despite a statute which "prohibited the parking of cars on the highway," and the statute is held only to apply to voluntary act of leaving car on the highway when not in use. *Kastler v. Tures*, (Wis., 1926), 191 Wis. 120, 210 N. W. 415.

There are cases which, though not upon absolutely analagous facts, do adhere to a holding contrary to that of Mississippi case of *Duke vs. Mitchell*. However, these cases are all based upon the principle that the owner of the parked vehicle has to use ordinary care. It will be noted, therefore, that the decisions are based largely upon a determination of fact as found by jury. Under a state of facts, where a driver stopped his truck, necessitated because of a raging and violent snow storm, and the truck had no rear light burning, the master was held liable for injuries to the party running into the rear of the halted vehicle. *Seibert vs. A. Goldstein Co., supra.* The strongest case contrary to the present Mississippi decision arose in an action for death and injuries caused by the collision of a Ford, driven by the plaintiff, with a heavy wagon belonging to the defendant. In this case, the wagon was totally broken down in the highway. White lanterns were left burning on every wheel of the disabled vehicle. When the accident occurred the plaintiff was closely following the car ahead of him, and he was blinded by the dust thrown up by said automobile in front of him. The court held that there was no contributory negligence imputable to the plaintiff, and that the proximate cause of the injury was the broken down vehicle in the highway. *Mitsuda vs. Isbell et al.*, (Cal. 1925), 234 Pac. 928.

LANDMAN TELLER.

SEARCHES AND SEIZURES—EVIDENCE—CRIMINAL LAW.—A deputy sheriff procured a search warrant for the search of appellant's home and premises for intoxicating liquor. Pursuant to the authority conferred on him by this warrant, the deputy, with two others, went to the home of appellant's father, where they found appellant. They served the warrant on him and proceeded to make a search of his father's premises where they found a ten gallon keg of liquor. Appellant did not reside at the home of his father but elsewhere. The appellant denied that he sold liquor but only bought it to drink. The evidence of the officers making the search and finding the whiskey was the principal evidence relied on by the state to convict appellant. Appellant's objection to the evidence was upon the ground that it was found on his father's premises, while the search warrant was for his own home alone. *Held*—in order for defendant to avail himself of his constitutional right against an unrea-

sonable search and seizure, his premises must be invaded and not that of another. *Roberts vs. State,* 121 So. 279.

As a general proposition this decision is firmly upheld by those in other states, especially Kentucky, where defendant upon denying that property on which illegal search was made belonged to him, could not claim thereafter that the search was unlawful. *Ragland vs. Commonwealth,* 265 S. W. 878, 204 Ky. 598; *Anderson vs. Commonwealth,* 263 S. W. 1087, 204 Ky. 486; *Ross vs. State,* 105 So. 846, 140 M. 367; *U. S. vs. Kapland,* 286 F. 963; *Lee vs. Oxford,* 134 M. 647; *Falkner vs. State,* 134 M. 253; *Harris vs. State,* 98 So. 349; *State vs. Finley,* 309 Mo. 534. These courts reason that the Constitution of the United States provides only against unreasonable searches and seizures on the property of the defendant; that he cannot set up such unreasonable search and seizure without a warrant, as a defense in his favor where he himself denies that the property so searched belonged to him. Even in cases where defendant was real owner of property on which search was made but had it leased at time of search he cannot complain of the unlawful search. *Buchanan vs. Commonwealth,* 275 S. W. 878. Here the decision was based upon the ground that defendant was not in possession or use of the premises as meant by the Constitution.

T. H. CAMPBELL, JR.

Insurance—Effect of Delay in Accepting Application.—M. L. Abernathy applied with the defendant's agent for an insurance policy which application provided that the risk should not begin until the delivery of the policy and the payment of the premium. The application was sent to the home office, and a policy issued to the applicant thereon, it being sent to the agent. The agent was out of town, and the delivery of the policy was delayed 50 days, during which time the applicant died. It was shown that he was willing and able to pay the premium. Suit was brought by administrator to recover the amount of the policy on the ground that the defendant owed the applicant the duty of either accepting or rejoicing the application within a reasonable time, the failure to do which would render the insurance company liable for the damages accruing therefrom. *Held*—Insurance company under no legal duty to accept or reject within a reasonable time application for insurance, and incurs no liability for failure to do so. *Savage vs. Prudential Life Ins. Co. of America,* Sup. Ct. of Miss. 121, Sou. 487.

The principal case, although well reasoned and supported, is by no means unanimously followed. A right of recovery in an action of tort against insurers has been upheld, on the ground of negligence in failing to act upon an application in the following cases: *Duffy vs. Banker's Life Asso.,* 160 Iowa 19; *Johnson vs. Farmer's Ins. Co.,* 184 Iowa 630; *Boyer vs. Hail Ins. Co.,* 86 Kan. 442; *Wilken vs. Capital Ins. Co.,* 99 Neb. 828. In *Duffy vs. Banker's Life Ass'n.* the court said: "The defendant owed the applicant the duty of either rejecting the application or of accepting it within a reasonable time, and upon the breach of duty it is liable for damages suffered in consequence thereof.

The court in deciding the principal case based its decision on the ground that there was no duty on the insurance company to enter into a contract of

insurance, and therefore was not liable for damages caused by delay in acting thereon. The principal case seems to be more sound than the opposing view, and is supported by the following cases: *National Union F. Ins. Co. vs. School District,* 122 Ark. 179; *Interstate Business Men's Ass'n. vs. Nichols,* 143 Ark. 369; *N. Y. Life Ins. Co. vs. McIntosh,* 86 Miss. 236; *Scottish Union, etc. vs. Warren Gee Lumber Co.,* 118 Miss. 740.

JASON H. FLOYD.

MUNICIPAL CORPORATIONS—STATUTES—WHETHER THE WORD "BUILDING" INCLUDES A BILLBOARD.—By municipal ordinance, the town of Union, Newton county, a fire district was created within the corporate limits of the municipality, which provided among other things that there should not be constructed in said fire district any building of sheet iron, wood or other combustible material, such buildings to be deemed a nuisance and abated and removed by the marshal of said town, at the cost of the town, in the event it was not removed by him. Ziller was served notice to remove certain sheet iron and wood structures used by him, and erected as billboards, under the provision of this act. Ziller refused and sought an injunction to prevent removal and destruction by officers of town of Union, on ground that such structures were not buildings.

Held—Words of statute or ordinance will be taken in ordinary and proper signification, unless enlargement or modification is necessary to effectuate legislative intent. Billboards with sheet iron surface held not buildings within law authorizing municipality to prohibit erection of certain "buildings" within prescribed limits (Hem. Code, 1927, Sec. 788). *Town of Union vs. Ziller,* 151 Miss. 467.

A building, as courts of Mississippi seem to consider it, is a structure which is designated and suitable for the habitation, or shelter of human beings or animals, or the shelter or storage of property, or for use and occupation for some purpose of trade or manufacture—taking the usual and ordinary acceptation of the word. This interpretation of the meaning of the word "Building" is in accord with the weight of authority. 9 C. J. 684-685 buildings—*Cowdrick vs. Morris,* 9 Pa. Co. 312; *State vs. Gibson,* 97 Iowa 416; *La Crosse, etc. R. R. Co. vs. Vanderpool* 11 Wis 119; *Trusdell et al. vs. Gay et al.*—13 Gray (Mass.) 311; *City of N. Y. vs. Winebergh Adv. Co.,* 107 N. Y. Supp. 478, holding a wall is no building. What is or is not a building according to 9 C. J. 686-687 will almost always depend for its meaning in some degree on the particular subject and its connection with other words. *Clark vs. State,* 69 Wis. 203.

This case does not mean to say that billboards can't be prohibited or removed by municipal ordinance but that they can't be removed or prohibited under an ordinance for the fire district as being included under the term "buildings."

E. J. SIMMONS, JR.

STREET RAILROADS—INJURY TO AUTOMOBILE DRIVING UPON TRACK.—This was an action by Baker against the Birmingham Electric Co. for damages as

a result of defendant's street car colliding with the plaintiff's automobile in a street in Birmingham, thereby causing injury to the plaintiff and his automobile. The plaintiff shows that the car line was a part of the street; that said street was narrow, and, in backing his car from his home or starting point, he went over or upon the track, but before doing so looked and discovered no approaching car. It is true that he did not, after getting in the street and on the car line, after his automobile stopped and he was attempting to go forward, look behind for an approaching car.

Judgment for plaintiff and defendant appeals. *Birmingham Electric Co. vs. Baker,* Sup. Ct. of Ala., 6 Div. 218.

The Court *held* that the plaintiff was not as a matter of law guilty of negligence in failing to look back for approaching car, as one who travels in a street owes no duty, as a matter of law, to keep a lookout to his rear for approaching vehicles, as he has a right to assume that those to his rear will not run into him and will at least give him warning of their approach.

Dissenting from the holding of the Court in one particular, viz., that the plaintiff was not guilty of negligence of any kind. The facts allege that the plaintiff looked for approaching cars before backing upon the track, and saw no near approaching cars. That must mean that he either saw no approaching cars at all or saw one at a distance not near. If he saw no approaching cars at all he must have been guilty of negligence in staying on the car track long enough to allow a car, that he could not see when he backed out, to collide with him from the rear. If he saw a car approaching at a distance he would seem to be negligent in not keeping a lookout for it knowing that it was approaching. It would seem that in either case the plaintiff was negligent. It would also seem that a driver of a car backing into a narrow street would owe a greater duty to use care in watching than the driver of a street car would owe in watching for drivers backing out of private drives on the car track in a narrow street.

HENRY HILBUN, JR.

AUTOMOBILES—ACTS IN EMERGENCIES.—There was a collision between the car of the defendant, and that of one Kennedy, resulting in the death of Kennedy. It appeared that Kennedy was approaching defendant, on his left hand side of the road, and appellant, in order to avoid a collision, veered sharply to his left of the road, Kennedy also turning to his right hand side of the road, the two cars colliding approximately in the middle of the road. Verdict for plaintiff, administratrix of Kennedy in the sum of $20,409.75.

Held—The law of the road requires each to drive on his right side. Laymen all know this rule, and cannot plead ignorance of it. Automobilist upon seeing car approaching on his right hand side of the road had a right to rely on the law of the road, and expect other driver to turn to right of the road, and was not bound to stop his car. (This principle was suggested in the case of *Goldsby vs. Lowrey,* 6 La. App. 450, the Court in that case saying however that it preferred not to decide the case on that point.) Automobilist suddenly placed in peril by approach of car on wrong side of road, exercised ordinary care in veering to left to avoid a head on collision and held not liable for death of driver of other car, even if last clear chance doctrine applied. *Kennedy vs. Opdenmeyer,* Ct. of Appeals of La., 121 Sou. 636.

The weight of authority seems to be according to the above announced principles of law—*Bragdon vs. Kellogg*, 6 A. L. R. 669; *Post vs. Richardson*, 116 A. 531; *Wilson vs. Johnson*, 161 N. W. 924. The opposite view is taken in some cases, namely, Missouri, in the case of *Shaw vs. Wilcox*, 224 S. W. 58.

The writer could find no case decided by Mississippi Court involving this specific question, but a case, *Flynt vs. Fondren*, 122 Miss. 248, suggests following the principles set out—interpreting Secs. 5777, 5781 and 5785 Hem. Code, 1927—Sec. 5781, stating the law of the road in Mississippi to be: drive on the right and turn on the right of the center of the road on meeting a vehicle approaching. Law of Road in U. S. is on meeting, each shall turn to right—*Palotta vs. Jackson Light Co.*, 107 M. 61.

An Alabama case, in *Watson vs. Ingals*, 119 So. 667, holds that reasonable care by motor vehicle driver on public highway depends on circumstances of each particular case.

E. J. SIMMONS, JR.

Explosives—Negligent Sale of Gasoline.—Appellee brought this action against appellant to recover damages for the burning of his Ford car and contents, as well as injuries to his person, caused by the alleged negligence of appellant in overflowing his car with gasoline during the process of filling the tank to the car, which overflow gasoline ignited, resulting in the injuries sued for. There was a trial, resulting in a verdict and judgment for appellee in the sum of $750, from which judgment appellant prosecutes this appeal. *Standard Oil Co. vs. Evans*, Sup. Ct. of Miss., 122 Sou. 735.

Seller of gasoline overflowing tank of automobile was charged with knowledge that gasoline is highly inflammable and that persons in and around automobiles striking matches for purpose of lighting cigars, etc., might cause it to ignite and that, also, parts of automobile sometimes become so heated from use as to ignite inflammable substances in or about automobile and burn it in whole or in part. And motorist did not assume risk of negligence of gasoline seller in overflowing tank of automobile, since seller should have reasonably foreseen that overflow of gasoline might become ignited in some manner, resulting in injury to motorist and damage to automobile. Motorist's contributory negligence in driving automobile in which seller of gasoline had overflowed tank when filling it would not defeat motorist's right to recover for seller's negligence, but would go only to mitigation of damages. This is the first time that this question has been decided by our Court.

HENRY HILBUN, JR.

Municipal Corporations—Highways.—Suit by a county against a village thereof to enjoin defendant from interfering with construction of a highway. An injunction was granted, and a motion to dissolve the injunction was overruled, and defendant appeals. Affirmed.

The Legislature established a system of highways and defined their routes. Laws 1926, chapter 45. One of these highways was defined as from Canton to Jackson, two cities on opposite sides of the village defendant. The

county, in order to secure aid from the federal government, had engineers to survey a route and this route as recommended did not follow the old highway but passed about three-quarters of a mile from the village, thus avoiding the necessity of two very sharp curves. The village, in order to force the county to build the road through it, threatened to enact an ordinance making it a misdemeanor to build a concrete highway through the village without the consent of the municipal authorities. The county then secured the injunction preventing the village from such interference and the village's motion to dissolve was overruled. *Village of Ridgeland vs. Madison County*, 122 Sou. 753.

Held—That the power of the Legislature over the municipal streets is plenary and that under the Laws 1928, c. 82, a county has right to build highway through village without the consent of the village authorities, and route need not follow one of established streets of village. *Canton vs. Cotton Warehouse Co.*, 84 Miss. 290, 36 So. 266, 65 L. R. A. 561, 105 Am. St. Rep. 428.

F. H. MONTGOMERY.

Schools and School Districts—Race or Color.—The appellees, plaintiffs in the court below, filed a petition for a mandamus against the trustees of a consolidated public school for the white race in Bolivar county, Miss., known as the Rosedale Consolidated School, against the County Superintendent of Education, and against the State Superintendent of Education, to compel said trustees and said County and State Superintendents of Education to admit Martha Lum, a minor of school age, of pure Chinese and Mongolian race, to rights of scholarship in said public school. It is alleged that Martha Lum is a girl of good moral character between the age of 5 and 21 years and an educable child; that she is a native born citizen of the United States, her parents being residents of the United States at her birth. It is further alleged that her father is a resident and taxpayer of the Rosedale Consolidated School District, and is therefore entitled to the right of the school; and that his children should not be deprived of the right thereof on the grounds that they were members of the Mongolian race. Petition granted in lower court. *Held*—on appeal, that Martha Lum is not entitled to rights of scholarship of the school, since under Sec. 207 of the Mississippi Constitution of 1890, providing that there shall be separate schools for white and colored races, the term "white race" as used therein is limited to the Caucasian race, and the term "colored race" is used in contradistinction of the white race, and embraces all other races. *Rice vs. Gong Lum*, 139 Miss. 760, 104 Sou. 105.

Although the present case is the first of its nature to be brought before our Supreme Court, the decision announced is in line with the weight of authority of other states. The Supreme Court of the United States has repeatedly held that legislatures of the various states have full power to separate the colored races from the white race in schools, and to designate what persons shall be comprehended by the terms "white race" and "colored race;" and that such act will not be in violation of the 14th amendment of the Constitution of the United States. *Plassy vs. Ferguson*, 163 U. S. 437, 544, 545, 16 Sup. Court Rep., 1138; *Reynolds vs. Board of Education*, 66 Kan. 672, 72 Pac. 274; *Mc-*

Milian vs. School Dist., 107 N. C. 609; *Cory vs. Carter*, 48 Ind. 327; *Bertonneau vs. Directors of City Schools*, 3 Woods, 172, Fed. Cas. No. 1361.

CARY STOVALL.

Intoxicating Liquors—Determining Probable Cause for Issuance of Search Warrant.—Appellant was tried upon a criminal information charging him with unlawful possession of certain intoxicating liquors with an alcoholic content of more than one-half of one per cent. The affiant, in the affidavit, merely stated that he had purchased a glass of home brew beer at the place owned by appellant. On this affidavit the search warrant was issued and the liquor subsequently found. *Held*—that the search warrant was without probable cause. Hence the search was illegal and the evidence secured thereby inadmissable. Courts cannot judicially notice that "home brew beer" is an intoxicating liquor, without proof of its alcoholic content. *Berry vs. U. S.*, (C. C. A.) 275 F. 680. Under this decision the Commissioner in the case at bar was not justified in issuing the search warrant because of the absence of the statement of the alcoholic content of the home brew beer. *Proulx vs. United States*, Circuit Court of Appeals, 1929.

F. H. MONTGOMERY.

BOOK REVIEW

PSYCHOLOGY FOR THE LAWYER.—By Dwight G. McCarty, New York: Prentiss Hall, Inc., p. 723.

The scope of this scholarly work is indeed a wide one covering, as its author states, a field little worked as yet, but fertile and full of possibilities. "Psychology for the Lawyer" is a very exhaustive work in which many of the psychological aspects of law are successfully covered. The author states that his aim is to present in a practical way the psychological factors involved in the practice of law, and by a frank discussion of the problems, together with approved methods of dealing with them, to enable the practitioner to increase the value of his services to his client and to the public.

In a singular manner the author has digested and presented in a remarkably clear exposition the numerous divergent beliefs of the various schools of psychology. And though the author is evidently a behaviorist still his treatment of them is a fair and impartial one.

The psychological factors, which give rise to human behavior and which mold and shape it in its contact with law, are amply discussed. The book presents factors which play a dominant part in all cases where either the plaintiff's or defendant's emotions, motives or intent were wholly or partly responsible for an action. Some of the topics which have been fully treated are: Psychology and Human Nature; Forces Molding Behavior; Motive; the significance of habits of thought and action; the origin and existence of bias—relating to witness, judge and jury, appeal to prejudice; intention, proof of presumptions of, intention and desire; facial and bodily expression with a discussion of the various types; observation, perception, memory and retentiveness and the distinction between the two, memory distortions, illusions; detecting the liar, types of liars, tests; covert suggestion, its operation and importance; the important role psychology has played in the law of evidence—*res gestae* dying declarations, books of account, confidential communications, failure of the accused to testify; characteristics of race, age and sex; psycho-analysis—repressions, manias, complexes. "Responsibility and the Criminal Law" is a very striking chapter which details the problems which the feebleminded and insane have and are presenting to the courts today. Medical Science and Legal Insanity and The Psychiatric Examination of Prisoners, discusses and explains many of these problems and shows how psychology has and should be allowed to aid in these matters. A treatment of the mental defectives is outlined; knowing the client; building a clientele; strategy in a law suit.

In the chapter dealing with the Law of Evidence Mr. McCarty proves that evidence, being essentially a matter of court procedure, has retained much of the common law system which has come down to us from the past. The general rigidity of the law and the conservatism of lawyers, he feels, is responsible for the old system which the modern science of psychology has shown

to be full of defects and in great need of revision. The ancient belief that it is necessary to protect the accused from self incrimination he shows to be detrimental to the ascertainment of the truth, that it might act as a crime deterrent, and that it creates a mental presumption against the prisoner who stands mute which no law or jury can overcome, which is created in spite of the precautions. Why should a guilty person be allowed such protection for his crime? The "dead man" statute it is pointed out is very conducive to perjury and fraudulent collusion. The discrepancies which the law has created by its presumptions in many cases is amply shown. "The trend today is away from the so-called 'presumptions of law.' These are not really presumptions at all. They are not evidentiary in their nature. They are, in fact, rules of substantive law. A very recent case from Idaho illustrates this distinction. The court declared constitutional a statute which in effect provided that an intoxicated person was deemed conclusively to be unable to control a vehicle on a highway. This case holds that the conclusive presumption of negligence established by the statute is not a rule of evidence, but a proclamation of substantive law." Arnold, it is shown, points out that presumptions are not free from attack, and contends that in the realm of mental qualities, human motives and conduct, legal presumptions must yield to the conclusions of psychology when they clash, for psychology has especially studied this branch. The futility of building up a rule on such narrow foundations as that upon which the rule of evidence that hearsay testimony is not admissable is forcefully shown. That the exceptions and modifications of the rule bulk so large as to obscure the rule itself, and that the assumption that statements not made in court are unreliable is false are shown. An example given by Hutchins is illustrative. "If a man now dead or beyond the jurisdiction once said out of court that he did not own a piece of land, that statement may be used against those claiming under him because he would not have made it if it had not been true. On the other hand, if the same man had said that he had committed a certain murder, the same psychological principle would not apply. The statement could not be used to rescue the accused from the gallows: the declarant might have been lying to save his friend."

"Psychology for the Lawyer" draws upon and bases its conclusions upon cases of: Charles J. Roper; Lorenzo D. Perrone; Carmine Lo Priore; Sacco-Vanzetti; Dennis Anderson; the Gloster Child Murder; the forger philanthropist, the banana peel case; the barbed wire patent case, and many other equally famous cases. The book is not and was not intended to be a textbook on Psychology. It is a comprehensive study of those aspects of human behavior and life which are the life blood of the lawyer. It is not only fascinating, but, with abundant illustrations, citations, references, and an appendix and bioliography, it should be a very valuable addition to the library of the alert and progressive lawyer of today.

In conclusion, Mr. McCarty gives us a bit of his own philosophy: "Reviewing the well-nigh futility of the whole drama, is it any wonder that thinking man, from the Neanderthal age to the present hour, has found himself hoping with all the urge of his very being that somehow, somewhere, there might be a state of being, a place under which and where he can have another chance." * * * * "For life is unfinished, always—an unfinished symphony—and there isn't a soul who has ever been capable of an intelligent

thought, who in his heart of hearts doesn't know that this is everlastingly true.'' * * * * ''It is human life and its fulfillment in the highest sense that constitutes the content of the law. Without the heart of humanity, the law is but an empty shell. The law must stand for the best in life and must vision the best in life. It must stand on a high moral and spiritual plane. 'Life is short and life is fleeting,' but the work done and the good accomplished are eternal.''

T. P. BRADY, JR.

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THE BRIEF ON APPEAL

By W. D. Anderson*

The assignment of errors and the oral agreement are so intimately connected with the brief on appeal that all three will be treated together as one subject.

Rule Six of the Supreme Court provides that, on or before the return day of any case in the Supreme Court, the appellant shall file an assignment of errors which shall set out "separately and particularly" each error asserted and intended to be urged, to which there shall be appended "a certificate that a copy has been delivered or mailed to opposing counsel"; that no error not distinctly assigned shall be urged by counsel except upon request of the court, but that the court may, at its option, notice a plain error not assigned; and that the right of the appellant to obtain a review of any ruling made in the trial court shall not depend upon his having filed in such court a motion for a new trial, "or, if such motion has been filed, upon the grounds thereof being distinctly specified."

The requirement that the assignment of errors set forth specifically and particularly each error asserted was only declaratory of what the Supreme Court had already decided. *Adams vs. Munson,* 3 Howard 77; *Ferriday vs. Selser,* 4 Howard 506; *Green vs. Crighton,* 7 S. & M. 197; *Cox vs. Cox,* 8 S. & M. 292; *Balfour vs. Mitchell,* 12 S. & M. 629; *Smith vs. Williams,* 36 Miss. 545. The appellant must put his finger on every alleged error, as every presumption is to be indulged in favor of the judgment or decree appealed from. In the case of *Smith vs. Williams, supra,* the court held that an assignment in these words, "The court erred as shown by the bill of exceptions," was void for uncertainty and indistinctness, and, for that reason, was not noticed by the court. In *Eaton vs. Hattiesburg Auto Sales*

* Associate Justice of the Supreme Court of Mississippi.

Co., 151 Miss. 211, 117 So. 534, the court held that an assignment that the judgment appealed from was contrary to the law and the evidence was too general to authorize a review by the Supreme Court. An error assigned and not argued will be treated by the court as waived. *N. O. and M. C. R. R. Co. vs. State,* 110 Miss. 290, 70 So. 365; *McCaleb vs. McCaleb,* 110 Miss. 486, 70 So. 563.

Rule Seven of the Supreme Court provides, when the brief shall be filed, its contents and form in the following language:

"Appellant's brief shall be filed not later than twelve days before the case is called for argument, and appellee's not later than five days before said time, and any rejoinder brief shall be filed not later than the day on which the argument is heard. This rule shall not apply where counsel have entered into a written agreement relative to the filing of briefs, but no brief shall be filed after the case has been submitted except by leave of court first obtained."

"The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel: first, a concise statement of the case so far as essential to an understanding of the questions presented for determination, with specific references to the precise places in the record where the points discussed may be found; and second, 'a brief of the argument,' which should consist of the points or propositions of law or fact to be discussed with the citation of authorities relied upon in their support."

"Briefs shall be typewritten or printed; and if typewritten, shall be in black, non-copying ink, double-spaced, on white paper, without the name of any person or advertising matter thereon. There shall be apended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel, and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof."

"Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this court will take such further action relative thereto as it may deem proper."

It is of the highest importance that counsel should thoroughly master the law and evidence of the case before he prepares his brief on appeal. If he has done this, he will have little trouble in making the Court understand his case. On the other hand, if he has not, court rules regulating the form and contents of briefs will be of little aid to him. It is hoped, however, that this paper will be

of some benefit to counsel, whether he be of the former or the latter class.

Paragraph 2 of Rule Seven of the Supreme Court states that the brief that is of most assistance to the court is the one containing, first, a concise statement of the case so far as concerns an essential understanding of the questions presented for determination, with specific references to the precise places in the record where the points discussed may be found, and second, a "brief of the argument which should consist of the points or propositions of law or fact to be discussed with the citation of authorities relied upon in their support."

The brief should set out, first, the style of the case, followed by a preliminary statement—for illustration, "Appellant brought this action of replevin against appellee in the circuit court of_____County, to recover possession of an automobile. There was a trial resulting in a verdict and judgment for appellee, from which judgment appellant prosecutes this appeal." Following this preliminary statement should be a statement of the material facts of the case. If the appellant takes the position that the material facts are undisputed, he should so state and challenge the appellee to take issue with him on that proposition. If the appellee, in his brief, agrees that the facts are undisputed, and that the appellant has made a fair statement of the facts, he should so state in his brief. If the controlling facts are undisputed, and that course is pursued, the labor of reading the record by the Judge to whom it is assigned is dispensed with. In such a case, only the questions of law are to be considered and decided. On the other hand, if the appellee claims that only a part of the material facts are undisputed, and that the others are in dispute, he should set out in his brief the disputed issues of fact, and refer to the pages of the record where the evidence will be found which, he contends, sustains his position.

And the appellant should file a reply brief setting out the places in the record where the evidence may be found which he contends sustains his position. If the appellant conceives that all the material facts of the case are in dispute, he should so state in his brief, and set out specifically the issues of fact and references to the pages of the record which he relies on as sustaining his contentions, and the appellee, in his brief, should do likewise.

In the trial of some cases, a great deal of irrelevant matter is put into the record. This often occurs without any fault of counsel on either side. Much of this is brought about in the cross-examination of witnesses. If such irrelevant matter can be eliminated by counsel in their statements of fact, it should be done. When irrelevant matter is thus eliminated, the Judge handling the record on appeal is thereby saved much labor. There have been cases before the Supreme Court in the last decade the records in which contained *volumes* of wholly irrelevant matter. By the exercise of proper care and diligence in the preparation of their briefs, counsel can and should relieve the judges handling such records from unnecessary labor in reading the parts of the records containing such irrelevant matter.

The specification of errors relied on and argued should follow the statement of facts, and the argument should follow that. In the argument, each principle of law contended for should be set out separately as it logically arises out of the case, and should constitute a separate head, and the argument and authorities sustaining it should follow. Counsel should cite no authority not read and thoroughly understood by himself. He ought not to expect the court to read authorities which he, himself, has not gone to the trouble of reading. Excerpts from the authorities relied on which are directly on the point being discussed are helpful to the court in the consideration and decision of cases. They aid the judge who handles the record as well as the members of the court in consultation. Quite frequently, there is found in briefs such statements as these: "That principle is 'hornbook law,' or that principle is too well settled to go to the trouble of citing authorities to support it." Whenever an applicable principle of law is stated in a brief, authorities ought to be cited to support it. This ought to be done because counsel is sometimes mistaken as to whether the principle of law contended for *is* well settled, and, for the further reason that the opinion of the court should always contain authorities supporting each governing principle of law.

The briefs for both appellant and appellee in *Harris vs. Hazlehurst Oil Co.*, 78 Miss. 603, 30 So. 273, are models of excellence both in form and substance. The court, in its opinion in that case, used this language in reference to those briefs,

"The principles of law applicable, and the authorities in which they may be found on both sides, are so admirably set forth by the respective counsel for appellant that we direct their briefs to be published in full, as models of excellence as supreme court briefs."

In recent years a practice has grown up among counsel briefing cases for the Supreme Court of citing the Southern Reporter, instead of the official report and the Southern Reporter. This practice seems to be on the increase. It results in much inconvenience and unnecessary labor on the part of the judges in preparing their opinions. It necessitates looking up the case relied on in the official report. The opinions of the Court, for reasons apparent, should cite the official reports, and in addition, for the convenience of the bench and bar, the Southern Reporter.

Recently, this court, in the case of *Johnson vs. State,* 122 So. 529, said this in reference to the brief on appeal,

"The essentials of an appellate brief may be summarized as a condensed statement of the party's case, together with a like statement of the propositions of law which the party desires to have applied thereto, with the reasons and authorities which sustain them. In this important step in appellate procedure, it is seldom that it is any more permissible to omit the authorities and their application than it is to omit the condensed statement of the case. 'As far as possible, the reasons assigned should be supported by the citation of authorities or they will not be considered, unless it is clearly apparent that they are well taken.' 3 C. J., p. 1431; 3 Ency. Pl. and Pr., pp. 722-3; 4 Stand. Ency. Proc., pp. 576, 577, 584-5. 'It is the duty of counsel to make more than an assertion; they should state reasons for their propositions and cite authorities in their support. . . . It is seldom sufficient to state naked legal propositions, for propositions are by no means always self evident.' Elliot, App. Proc., pp. 375-6; and when not self-evident the party who advances them and cites no authority to support them may justly be said to have failed to maintain them. It is a strange case upon which, in these days of tens of thousands of law books, no authority can be found, and when none is presented and the proposition is not manifestly well taken, there is the practical presumption that the authorities do not sustain the proposition, else they would have been cited. The courts frequently speak of such unsupported propositions as having been waived because of failure to properly present them. There are several reasons which make it necessary to give weight to the foregoing considerations, one of which is that no Supreme Court could ever keep up with its docket if the judges were put to the task of briefing those cases of which the parties themselves have thought too little to brief."

Rule Seven of the Supreme Court requires all typewritten briefs to be on white paper, double-spaced, and in black non-copying ink. Oculists agree, and it is the common experience, that reading matter in black type on white paper is less straining on the eyes of the reader than reading matter on paper and type in colors. Necessarily, the members of the court do an enormous amount of reading in the performance of their duties, and the object of this rule was to provide, as near as could be done, against eye strain and other injuries to the eyes. In *Water Valley vs. State,* 103 Miss. 314, 60 So. 325, the court held that this rule was violated by appellant's brief being partly in red and partly in black ink, and, for that reason, remanded the case to the docket with leave to the appellant to file a brief in compliance with the rule; and, in *Bank vs. Lampton,* 103 Miss. 398, 60 So. 561, the appellee's brief was single-spaced throughout, and the court held that the rule applied not only to the original matter contained in briefs, but that all quotations should be double-spaced and indented, and remanded the case with leave to the appellee to file a brief in accordance with the rule. Not only colors in paper and type are hard on the eyes of the reader, but single-spacing as well.

Paragraph (a) of Section Two, of Rule 27, of the Supreme Court of the United States, requires that a subject index accompany each brief filed in that court, that paragraph being in this language, "a subject index of the matter in the brief, with paged references and a table of cases (alphabetically arranged), text books and statutes cited with reference to the pages where they are cited."

The writer believes that it would be a great help to our court in the consideration and decision of cases if all briefs contained such a subject index, for the following reasons: Briefs range in length from something like five to 300 or 400 typewritten pages, the average length being something like 15 to 20 pages. After the Judge who handles the record has thoroughly familiarized himself with the briefs and the record, he next takes up for reading and consideration the authorities cited in the briefs. If the brief contained, either at the front or at the end, a subject index, the Judge would have there, in succinct and convenient form, each proposition of law argued in the brief and the authorities relied on, and he would use that instead of turning from page to page through the brief to find the different questions of law discussed, and the authorities

in support of them. Furthermore, in the consultation room, in putting the case before the other Judges, such a subject index would be a great help and convenience and would save much time. Such an index need not occupy more than three or four typewritten pages. It is simply a brief statement of each point argued in the brief, followed by a mere citation of the authorities relied on, unaccompanied by any argument. With proper care and consideration, almost any legal principle can be stated in from one to a half dozen typewritten lines. The argument should be simply an elaboration of the subject index.

Supreme Court Rule Ten is the only rule of our court that contains any reference to oral argument. It provides that only two counsel will be heard for each party on the argument of a case. The time allowed therefor will be determined by the court, and it may be apportioned between counsel on the same side, if so desired, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

The oral argument most beneficial to the court is the one that puts the court in possession of *an outline of the facts of the case and the legal questions involved.* There is always some delay between the submission of a case and its consideration and decision by the court; sometimes several weeks elapse, and infrequently, months. All cases are argued orally in regular order, and sometimes several are argued at the same sitting of the court. Probably something like an average of from seven to ten cases are argued orally at every sitting of the court. If the oral argument goes into the issues of fact in *detail,* the result is often confusion in the minds of the judges, because of the difficulty of carrying the details in mind for weeks, and sometimes, months, before the case is considered and decided by the court. On the other hand, a clear, succinct statement of the material facts of the case, including the undisputed facts, as well as those about which there is conflict in the evidence, followed with a brief statement of the legal points involved, are carried by the Judges in mind until the case reaches the consultation room. Such an argument is valuable to the court, and, as a rule, the maximum time required to make such an oral argument is not more than thirty to forty minutes. In many cases, such an argument can be made in from ten to twenty minutes. With the Judge who handles the record, as well as in the consultation room, the record in the case and the

briefs are controlling. However, oral argument of the character indicated above, facilitate the examination of the record and briefs by the Judge to whom the record is assigned, and, in addition, is helpful in conference.

SOME THOUGHTS ON THE GREAT PROBLEM OF DIVORCE

By John B. Brunini*

Lord Neavas, a noted Scottish judge and wit, in verse gave clearly and with exactitude the common-law rule of marriage:

"Suppose the man only has spoken,
The woman just giving nod;
They're spliced by that very same token
Till one of them's under the sod."

The lawmakers of Louisiana, with the civil law as a basis of their jurisprudence, went to the other extreme by making the ceremonial form of marriage alone valid.

With the Canonical aspect of marriage dissoluble or indissoluble, interminably controversial, this article shall have nothing to do, nor shall the common law or ceremonial form of marriage have consideration.

No doubt, the Scripture has given marriage a dignity and sacredness far above the mere solemnity of a contract, and to it and its ministers civilization owes much in its effort to maintain unbrokenly the marital relation.

The State for reasons of its own has been impressed with the soundness of the religious view, and although it has yielded to the clamor for the need of divorce, it has not treated the dissolution of marriage lightly or with favor. The grounds for divorce are few, and must be supported by evidence of the complaining party beyond the admissions of the other.

To the State it is a question of sociology, pure and simple. The continuation of the marital relation is indispensable to the existence of the State. When procreation ceases, society ceases. When society ceases, the State ceases.

The chief concern of the State then is the offspring of the marital relation, but for this fact the State would not manifest any greater interest in the marital contract than it does in commodity contracts.

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While the grounds for divorce in this State are few, the courts are exceedingly liberal—and it might be said generous—towards the complaining party in their application of the law to the facts. In that aspect divorces are usually easily obtainable. Again, divorces are denied where collusion of the parties is proven. Such is the law, but in practice this is no deterrent, for the simple reason that in such cases seldom does the defendant make a contest and therefore a simple denial on the part of the complaining party is all sufficient to meet the statute on this score.

Unless property or alimony is involved—and less frequently, children—seldom is there a contest. You find very few cases contested—perhaps not over two or three per cent—in which no property or alimony or children are involved. It has often been said by a lawyer friend of the writer that if he had no lawyer on the other side he would have little trouble in winning all of his cases. John Quincy Adams had a true conception of a law suit. His definition was that "it was a conflict of rights to be settled by a conflict of talent." Nothing is truer.

Seldom in litigated cases—and especially where intense adverse feeling has been aroused—does the court or jury get more than a fragment of the background. Yet nothing is more important to the proper administration of justice. Probably this is so in divorce cases more than in others, as the spirit of enmity is more intense among relatives than among strangers.

If the true backgrounds of the cases of divorce were made known and understood, the number of divorces granted would lessen and lessen.

It is assumed that all admit that the divorce evil is growing, and that it is a real menace to society and to the State. Aside from the tender feeling that the infant engenders in the breast of every one, the child needs the aid, materially and morally, of both parents. Often that is not sufficient. If incompetency exists in any degree in either parent, the child and the State suffer from their failure to bring forth good fruit. No one has a right to put upon society his burden of properly caring for his child, materially or morally.

The State, therefore, has a deep and material interest in the maintenance of the family. Granting this proposition, then, why should not the State be represented in every divorce case? Why not have the County Attorney

or the District Attorney charged with this additional duty? They look after the crime of the community for society's sake. Then why not after the interest of the child for the same reason? Is it not more beneficial to society to produce a crimeless child than to punish a criminal one? Is it not more beneficial to society to produce a man of the highest standard than one who is in any degree a failure? The representation of the State in all divorce cases will be a partial step, not a panacea, towards removing the evil of divorce.

Another constructive legislative suggestion is of greater importance, in the opinion of the writer, in the lessening of the evil under consideration. An example from actual practice will forcibly present the suggestion for the reader's consideration: The husband had provided his wife with a comfortable home, a car, and maintained ample provision for his wife and two small children suitable to her and their condition in society. He was a rough and ready fellow; cursed now and then out of habit, but seldom with meanness. Quarrels began and ultimately wound up in the magistrate's court. The wife and all her family connections repaired to a lawyer's office for the purpose of immediately filing a bill for divorce. They were in a state of great excitement. The lawyer undertook to compose them. He sought the background in his queries, and suggested that they return the second day afterward. They did so. The lawyer in a kindly way pictured to those assembled the details of the background: That the couple during the time of courtship and marriage, and for several years afterwards, loved one another; that they had the reasonable comforts of life in their home; that they had two small children who needed the care and the attention and the comfort of both father and mother; that the stork was to bring another to bless their home in a few months; that the wife knew in courtship that her husband was rough and ready and addicted to the use of curse words as ordinary ones in his conversation; that he had been extremely kind and considerate until of late; that he pretended that his mother-in-law's interference was to blame; that his duties as a railroad trainman took him from his home in the afternoon; that he spent the evenings and nights in the town at the other end; that he returned to his home the next morning, giving him but three hours out of the twenty-four with his wife and children.

The lawyer then injected this virus: That perhaps after washing up in the evening and partaking of his meal, he had no place to go for amusement and that time bore heavily on his hands; that perhaps he was living in a boarding house at the other end; that perhaps the ladies there and the men around would propose church, or the movies, or a ride; that perhaps at first they would all go; that perhaps through little attentions of the husband to one of the party, he received a reciprocal interest, or perhaps affection; and that perhaps this made the husband look with less favor upon his home, and his wife and children, and it brought about a quarrelsome spirit.

Then, turning to the wife, the lawyer appealed to her to say if she herself was not at fault in permitting her husband to be thus subjected to this temptation, and if she didn't think her home should be at the other end of the line, where her husband could be with her and the children for at least twenty of the twenty-four hours.

The wife and her relatives promised to return in the next few days to file the papers. Without returning to the lawyer or advising him, the wife and children left with the husband the next afternoon to make their home at the other end, and never to this day have they communicated with the lawyer. But he learns that they have been living contentedly and happily ever since.

Space forbids the writer from mentioning numerous other instances of reconciliation. Lawyers who have passed their meridian, no doubt can multiply similar incidents, showing the effectiveness of their efforts at peacemaking.

The lawyer is an officer of the court, and he should never—where children are involved—file a bill for divorce until he has exhausted all reasonable means to reconcile the parties. This should be a part of the ethics of his profession, and just as he is required on filing a demurrer to certify that he believes it well taken, he should be required to certify on filing a bill for divorce that he has diligently and scrupulously endeavored to reconcile the parties.

In furtherance of this suggestion, our statute should be so amended that no divorce should be granted in less time than six months after suit is entered, and that the Clerk or Chancellor should, on the filing of the suit, appoint two or three members of the bar—not interested in the case—or two or three representative citizens, to study

the case and make a report of their finding of the circumstances and facts to the Court, so that the Chancellor might have the background which we all know he cannot fully get through the partisan and usually ex parte efforts of counsel, and the indifference or collusion of the defendant. The referees, the writer dares say, in at least 75 or 80 per cent of the cases would have the parties together before the meeting of the Court. The ministers and social workers, as well, make effective aids in bringing about reconciliation among the warring parties.

It is well known to the members of the bar who have had some years of practice and experience that there are many cases wherein one or the other of the spouses has given cause for divorce, and which do not find their way into the courts. The parties themselves reconcile their differences and live happily together. In the marital life, the couple sometimes has rough seas, attributable in many instances to misfortune or adversity of one kind or another. When there is not smooth sailing, frequently you hear of grumbling and dissatisfaction, but the sunshine reappears and the bark sails on!

UNJUST STANDARDS FOR LAW PRACTICE

Effort to Raise Standards for Lawyers Is Discussed, With Suggestion That It Is Unreasonable

By Geo. H. Ethridge*

The committee on legal education of the Mississippi State Bar Association for the year ending with the meeting of the last State Bar Association submitted for the consideration of that association a report on legal education and requirements for admission to the bar, in which it advocated a change in the requirements for admission to the bar. I oppose this proposition for two main reasons, around which cluster many other minor propositions. The committee recommended as follows:

"In conclusion, your committee earnestly recommends, (1) that the association give its attention to securing the following legislation: (a) So amend Section 180 of Hemingway's Code that all members of the examining board shall consist of examiners who have both a law and a literary degree from some standard college, approved by the American Bar Association or the Association of American Law Schools; (b) and shall hold office for four years and shall be appointed by the governor from a list of 20 nominated by this association. The board shall consist of five examiners, one from each supreme court district and two from the state at large; (c) that Section 182 of Hemingway's Code be so amended that all applicants for examination be required to furnish after September 1, 1930, evidence of at least one year's work in an A grade institution, together with evidence of having studied for two full sessions in some law school approved by the American Bar Association or the Association of American Law Schools; (d) and further, after September 1, 1932, every applicant shall give evidence of having completed two years in some A grade university or college and exhibit a diploma from a standard law school with a course of three sessions' work; (e) that the passing grade on a bar examination after September 1, 1932, be fixed at 75 per cent; (f) that Section 184 of Hemingway's Code be so amended as to include the following subjects: Contracts, Torts, Damages, Agency, Sales, Corporations, Trust and Mississippi Pleading; (g) that Section 184 of Hemingway's Code be so amended as to make the fee to be paid by each applicant $25 instead of $10; (h) the passage of a statute making it incumbent upon the secretary of the board of examiners to keep in a well bound book

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the names of all the applicants for the bar examination, together with the result of the examination. The reports to clearly show the names of all those failing and those to whom license is granted, together with their post office address. The said book to be kept in the office of the secretary of state and open to public inspection. (2) Your committee would recommend a committee of distinguished lawyers, members of the association, including the president and vice-president of the association, be appointed and charged with the duty of creating sentiment among the bar of the state favorable to the foregoing recommendations; and, further, that the committee be empowered to bring these matters before the next Legislature at its session in 1930, and secure the passage of laws which will make effective the suggested changes."

OPPOSED TO THE REPORT

This report raised a discussion and it was deferred for action and discussion at the next annual session of the State Bar Association. I am opposed to the adoption of this report and the enactment into law of these suggested changes, and my objection may be placed under two principal heads: First, the changes are not necessary; second, the proposition is undemocratic and tends to create by law a favored class or a professional aristocracy to consist alone of those who have the good luck to be born well off financially, or who have rich friends who will let them have the means to take up these long years in school. In order to get the matter fully before the public it will be necessary to inquire into the present standards of admission, and, secondly, the requirements for the successful practice of law. Before going further I desire to say that I have the highest regard for the members of the committee on legal education and admission to the bar who signed and recommended this report. If these propositions had originated with these excellent people I would be slow to question their wisdom. But it is nothing short of the fruits of undemocratic propaganda gotten out by the endowed colleges to limit those who enter the learned or "genteel" professions to the sons and daughters of the rich, and to create by law class distinction, which should never exist in a democratic or republican government. What is now required for admission to the bar of the state?

By Section 184 of Hemingway's Code, 1927 (Laws 1916, Chapter 107) it is provided that any person desiring to practice law shall be examined in writing by a sufficient

number of questions to thoroughly test his legal learning upon the following subjects, viz.:

One—The law of real property. Two—The law of personal property. Three—The law of pleading and evidence. Four—Commercial law. Five—Criminal law. Six—Chancery and Chancery pleading. Seven—The statute law of the state. Eight—The Constitution of the United States and this State. Nine—Federal and state practices. Ten—The Federal statutes relating to judiciary and bankruptcy. Eleven—Professional ethics. Twelve—And such other subjects as the board may deem proper.

Section 182 of said Hemingway's Code provides that before a person shall be eligible for examination he shall be a citizen of the United States and a resident of this state above the age of 21 years, of good moral character, and shall have at least a high school education or its equivalent.

By Section 183 of Hemingway's Code it is provided that said board shall inquire into the moral character of the applicant and other qualifications other than legal learning, and to that end may examine witnesses. It is therefore seen that the applicant must have a high school education or its equivalent. By provision No. 12—of the subjects upon which he may be examined—the board may examine him on literary subjects, should it see proper to do so, to test his literary education. A high school education, under present day requirements as to subjects, is equal to a college course a few years ago. To get a high school education under present standards requires constant attendance and the passing of the averages required by standards now under state supervision for 12 years, which makes it now necessary for the child to attend school at least eight or nine months in the year. It will not be able to follow any gainful occupation during that period except a possible three or four months in the year. The parent or guardian must support the child without any appreciable help from it until it is at least 17 years of age. Many cannot pass a grade each year, but require, in many cases, one or two or three years extra. The curriculum of the high school is such that those who pass through it must have a good English education and some in other languages, also some knowledge of higher mathematics. Many people are not able to give their children even this much education in the schools. But the ambitious boy or girl may learn at home by patient and diligent study, and may ac-

quire a complete education in the subjects taught in the high schools, or even in the colleges. But he cannot get a diploma from these "standard" colleges and universities, no matter how much he may know; to get such a diploma he must go up through a standard high school, and must then go the required number of years to a college. Why not let each person who has the necessary knowledge enter the profession, no matter how or where he acquired that knowledge? Why is not learning acquired in the home or office, in private study, just as honorable and sacred as that acquired in subsidized schools? Is not, in fact, the boy or girl who disciplines his or her mind, and cuts out pleasures and indulgences to get an education, entitled to more credit than one who has it handed to him by rich parents and hired teachers? Is it right to draw distinctions on the lines proposed by the committee? Is this country ready to abandon the principles announced in the Declaration of Independence and return to the caste systems of Europe and Asia? Has not the fact that any child, no matter how poor or humble its youthful condition, may hope by patient effort to prepare himself for the highest places in the gift of his country, stimulated our people, and made us the greatest nation in all the files of time? We can look to those who in the past have worked their way into high places in all lines of life with pride. Does not this encourage parents to make sacrifices for their children? Some of our greatest, best and most honored and most useful men have thus worked up from an humble station, to the highest places in the land.

Every person who desires success in the professions of life must do his best and make every preparation in his reach if he is really to succeed. He will not succeed with any education if he stops when his school days are over; but he must keep up the struggle and effort all the days of his life. The subjects above set forth for examination are comprehensive, and practically cover the field of law. Any person who covers that field, and stands a real examination therein, will have enough legal learning to practice law. Of course, no man immediately jumps into an active and remunerative practice. His beginnings will not resemble the fortunes of Midas. People will be slow to go to him with cases of great importance, for they have that practical wisdom which enables them to know that a man cannot be a fully matured and practical lawyer who has not measured his wits with adversaries

in the actual forum of the courthouse. He is called upon to acquire more learning before he is able to run a law office of the magnitude of that ruled by Silas Strawn. During this period of "watchful waiting" there will be leisure to do much reading, if he has the will and the ambition to succeed.

PROPOSAL IS UNDEMOCRATIC

This country is a representative democracy, and its cardinal principle is that of open and equal opportunities for all men, regardless of the accident or condition of birth. It has been demonstrated beyond a doubt that open opportunities for all is the best policy. A man should be estimated by his real accomplishments and character. It ought not to make any difference where he gets his learning or how his mind was trained to efficient thought, if it is really so trained. So why is it proposed that no man can hereafter be a lawyer who is not educated in a college, and one of that class approved by the American Bar Association? Did not the Dean of the Law School go before the Bar Association at its meeting in Jackson in 1927, and urge upon it to get behind a movement to get the Legislature to equip our Law School at the State University in order for it to be recognized by the Association of Law Schools? Under the standard now proposed, can a student who graduated in law a few years ago get in the law class at all? He could not. Without some exceptions in his favor, most, if not all, of the lawyers of this state who have been at the bar five years, or longer, could not go into another state and stand a legal examination under these Association of College standards, because he did not get his training in the character of school that this standard requires. He might have the very highest type of education and accomplishments, and might be as learned as the best of them; but if he got his learning outside of a standard A grade college, he would have to stay out. Is it fair? Is it just, for a man to get in the profession under one standard and then draw artificial distinctions against his fellow to keep him from getting in under the same conditions? Why is not the good old democratic doctrine of "equal rights to all and special privileges to none" as sound now as it was in the beginning? Will not the standard cripple our efficiency? Will men struggle as hard for efficiency when they have but little competition? If the standard

is adopted, will not the poor feel, and justly feel, that this government is unjust?

Will not the taxpayers rebel at taxation that shuts the door in their faces and appropriates the tax money illegally to the support of the nobility? Will he not become "red" in his thinking? And will he not be in rebellion against a government that taxes him for the benefit of the rich alone? The committee cites standards in other professions and occupations as justification of their demand to follow suit. Does that prove their case? Is it not a fact that the country doctor is driven out of the profession by these high standards? And is it not true that people are leaving the country partly because they have no resident doctors? Is it not a fact that some of our most eminent men in all lines have come up from the ranks without the benefit of college education? If men like John D. Rockefeller and Andrew Carnegie outstripped their college-bred competitors in business and accumulated immense fortunes, is it not evident that the mind can be trained and character formed in other realms than that of the college? What reason is there for requiring a degree in a standard college for the teaching of common school subjects? Why cannot a mother, who may have to become a bread winner, teach children as efficiently as her college favored sister? Is there not a lot of pure "bunk" in requiring college degrees for many of the fields of activity? I want to see education and educational institutions thrive. I want every child, however situated, to have the best possible training for life; but I do not want to see unwise requirements nor useless standards adopted. I believe that a college education is good for those who think, and who have learned to evaluate and use it properly. Let them, however, enter business, in competition with all who can get the necessary learning for that particular field on equal terms, and let the best man win in the field of competition. I want no illegitimate aristocracy or snobocracy. The choice places in life should not be fenced in for the rich. A few years ago Charles Schwab, in a magazine article, favored creating a nobility based upon wealth. He was outspoken; and many of those who share his views believe that wealth alone is a sufficient base for nobility. There is going on day by day, in many magazines and publications, agitation for the abolition of our democratic institutions, and the supplanting of them by other institutions granting special favors and privileges.

It becomes every citizen who loves the constitutions of his father, to stand firmly against this movement.

WHAT THE LAWYER NEEDS

There is much in both the high school and the college curriculums that will be of but little benefit to the lawyer. It is desirable, of course, that lawyers have some "polish," some adornment of mind, but that is not essential and nothing should be required as a condition of admittance to any occupation or profession that is not required for its successful operation or pursuit. The lawyer's business arises out of the common affairs of business and social life. He is much more concerned with what people are doing and saying and thinking at the present time than he is with ancient history, dead languages and foreign tongues, and conditions in other lands or past ages. He has but little practical use for many of the things that are taught in the schools. He does need to know the English language, and much of English history and institutions, to get at the root of the law and to trace settled principles to their historic origin. But he is mainly concerned with practical every day things in this country. The people do business on current understanding and in the living language of the country. The lawyer is largely concerned with understanding what a particular contract is, or what motives entered into specific transactions, conversations and understandings. Such transactions are mainly with people who know only one language, and are never negotiated in any other language. The mathematics a lawyer deals with are usually solvable by the principles of arithmetic, although other branches occasionally enter therein. My experience has been that cultural training plays little part with most lawyers in the preparation of their cases. The high school furnishes as much learning as a law student is required to have. Law books are no longer written in foreign or dead languages, and all that the student needs to comprehend the law books is a fair education in the English language, with elementary science, social organization and history. If he is confronted with a scientific proposition, he must usually get an expert to testify, and the expert can give him all the information that he needs to comprehend the subject if he has the general education now required of him. There is more excuse for requiring higher education for the doctor of medicine and the pharmacist, because they deal with deadly drugs, mysterious

symptoms and dangerous diseases, wherein a mistake may lead to loss of health or life. The mind can be trained outside of schools altogether, and under modern conditions, the art of reading and writing is more easily acquired than formerly.

We have lexicons for lawyers, lexicons for doctors, dentists, pharmacists, and many others, wherein all terms necessary to be known can be learned by any person who has common sense and the perseverence to apply their minds to the task. Many lawyers in the past have risen to the highest places in the profession without even a high school education. Among these may be mentioned Patrick Henry, the Sage, Seer and Son of Thunder of the Revolutionary period; John Marshall, the greatest jurist of all time; Henry Clay, a more successful lawyer than he was a statesman; Andrew Jackson, Abraham Lincoln, and a host of others. John Marshall was certainly competent to judge good lawyers, and he ranked Patrick Henry very high as a lawyer. It is said that Henry Clay won all of his cases, although he met learned and able adversaries. Abraham Lincoln ranked very high as a successful lawyer. Every man now living in this state who has been at the bar any considerable length of time will recall many lawyers of great ability who had only a grammar school education, except that which they got by personal and private study. It might be embarrassing to some of them to call names, because no man wants to have his disadvantages aired; but I could name many whose legal ability no man who ever met them in legal battle doubted. I want it distinctly understood that I do not deny the advantages of thorough education. The more of it a lawyer has, the better for him. But it does not matter how he has acquired it. It is just as effective when acquired in a room by lamplight, or in an office while working for daily bread, as in the finest college in all the world. If there are any subjects which the lawyer ought to specially study and be examined on to procure a license, let them be named so that he may prepare himself for a fair examination thereon, regardless of where he obtains his knowledge of them, and whether he be rich or poor. Let's keep the doors of opportunity open to all alike; let's not require a poor man or boy to become a debtor or a slave to procure his learning in favored institutions. The standards advocated by the associated colleges are artificial and are higher than are required.

DEMOCRATIC INSTITUTIONS NECESSARY

Let us keep all our public institutions democratic; let us remember that our national prestige is due entirely to our democratic government and heretofore democratic institutions. Those which are built and controlled by subsidizing them may have as much of this fictitious nobility as they desire, so long as they are not favored by law, but when institutions are built by the people and are supported by the taxes they pay, let's keep them democratic, and in them let us teach the principles upon which we have hitherto grown great. Let's not kindle the fires of revolution and class hatred by establishing class privileges and by taxing the poor for the support of special and favored institutions of learning. No government should create favors for any one class at the expense of another. The principle of favoring one class at the expense of another is condemned by the federal constitution in prohibiting the creation of a nobility. This prohibition was imposed upon Congress and the several states as well. It may be possible for lawyers and courts to distinguish the letter, but the spirit in both is the same. For one, I am sorry that the United States Supreme Court did not look through the form to the substance and uproot this nefarious principle when it was presented to it. But the fact that classes of nobility, in substance, can be created by classification, which, in theory, may be said to be open to all, but which in fact is not, should not move us to act upon that vicious principle. All of the early state constitutions, including our own, condemned this practice of granting favors apart from meritorious and distinguished public service. When we look to the future, visualizing the great problems that confront us for solution, we see that we will need all the wisdom and patriotism that the whole people possess for their rightful solution. If we breed disloyalty and discontent we will find that they will vex us more surely, and may cause our government to fall back into the vicious channels that ruined the world for many years, and where the rights of the poor were trampled in the dust by a favored nobility. If we go on with our noble task of raising mankind up to the highest attainable heights by equal opportunities and helpful education, we may yet redeem the world from the reign of injustice.

If the committee wants a fair examination, why is it the examiners should be specially selected from those who

have both a literary and legal diploma from a "standard college," approved by the American Bar Association? Why is it, if competency and fairness be the end sought, that we should select only those who are reared in an atmosphere of prejudice against all men who have not secured their education in a "standard college?" Is it not because they want to exclude from the profession all who have not been born with a "golden spoon" in their mouths, and who have a prejudice against the self-educated men and women of the land? Will not such examiners discriminate against those who have not, like themselves, been the children of fortune? Every right thinking person knows that the man or woman who has studied hard and made great sacrifice to enter the profession, will be excluded, no matter how much they may know, or what their natural abilities are. This test will exclude all of the experienced lawyers who were educated even in the State University 12 or 15 years ago. It is one of the most vicious class law propositions ever sought at the hands of the people. It is in conflict with section 250 of the constitution of the State, which was enacted by Democrats, and for the securing of the principles of democracy. That section prohibits the Legislature from enacting any qualifications for statutory offices, other than those prescribed by that section. This scheme, if enacted, will do more to create class prejudice and class hatred than any legislation heretofore enacted. It ought to be killed as surely as any other class legislation.

THE GREATEST GOOD OF THE GREATEST NUMBER

By Phil Stone*

The present issue of this publication, through the kindness of Justice Ethridge, reprints his article on the present effort to raise standards of admission to the bar in Mississippi. The aim of the present writer is to examine into the matter and try to determine whether or not the suggested changes are really unjust to prospective lawyers or harmful to the public interest.

Those who expect the writer to take violent issue with Justice Ethridge in bitter and bloody contest may as well stop here. They will be disappointed.

In the first place, I hold with the philosophy of Justice Ethridge—whose philosophy is also the philosophy of that other great liberal, Justice Holmes of the Supreme Court of the United States—that truth is no weakling and that the best proving ground for truth is the open forum of the marketplace. Because a program is advocated by the leading lawyers of the state and of the nation is no certainty that such program is the last word in wisdom, pure and unassailable. Nor does such distinguished sponsorship make it certain that the suggested changes are practicable in our own State. I consider that the best way to arrive at the desirable and the practical in this matter is the way of calm, tolerant and frank discussion and not the way of partisan argument. Let us in a kindly manner take counsel together.

In the second place, I would not attempt to measure my puny wisdom with the learning, the experience and the scholarship of Justice Ethridge. Most of all, I have too great an admiration and respect for Justice Ethridge as a judge and as a man. I regard him as the great liberal of our Supreme Court bench, ever behind his opinions the shadow of the vague mass of humanity, ever aware that laws are made for men, and not men for laws. I know of few more stirring pictures in Mississippi history than that of Justice Ethridge, sincerely a personal and political prohibitionist, standing with Justice Anderson

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calmly and fixedly against the popular clamor of a righteous cause and saving that bedrock of our civil liberties, Section 23 of our Mississippi Constitution, from being destroyed.

It is not necessary here to set out the suggested changes, because they are set out in the article by Justice Ethridge. Most of the suggested changes are merely changes in the methods of procedure to determine the fitness of the applicants for admission. I shall not discuss them here, because I do not feel that they are important. They are simply methodical and if they are objectionable a dozen different similar ways might be provided. The basic question is whether or not our standards for admission should be raised and, if so, how much.

It is to be noted that the required standards already provide that a high school education or its equivalent is necessary. I cannot here refrain from commenting that this existing requirement would itself have eliminated Abraham Lincoln and numerous other great lights of our bar in the early days of our country. Furthermore, if the suggested educational requirements are in violation of Section 250 of our State Constitution—as Justice Ethridge suggests—why isn't the present requirement of a high school education or its equivalent in violation of that section of our Constitution?

The suggested changes which go to the fundamental question of raising the standards of admission are:

1. That all applicants for examination be required to furnish after September 1, 1930, evidence of at least one year's work in an A grade institution together with evidence of having studied for two full sessions in some law school approved by the American Bar Association or the Association of American Law Schools.

2. That, after September 1, 1932, every applicant shall give evidence of having completed two years in some A grade university or college and exhibit a diploma from a standard law school with a course of three sessions' work.

3. That the passing grade on a bar examination, after September 1, 1932, be fixed at 75 per cent.

It should be noted in the first place that these proposed regulations do not affect the present privilege of the graduates of our own State Law School at our state-owned and state-operated University of Mississippi.

The graduates of this law school may still continue to be admitted to the practice without being called upon to

stand a bar examination. Furthermore, these proposed changes, at least the last two of them, can hardly affect very seriously anybody now engaged in the study of law, since neither of these last two proposed changes can come into operation until September 1, 1932.

Are these suggested changes undemocratic and harmful to the public interest? I shall consider this question, first, from the standpoint of the lawyer and of the prospective lawyer; and, second, from the standpoint of the public good.

As to the lawyers already at the bar, these proposed changes affect them very little. They have already been admitted to practice. They may be benefited by these changes in that they will have fewer lawyers to contend with and in that there will be a higher grade of lawyers with whom they will have to deal. Justice Ethridge will, no doubt, dispute the beneficial effect of this first predicted result and deny the inevitability of the last predicted result, but that can be discussed later. Certainly I think it may fairly be said that, even if no good results to the present members of the bar from the adoption of the proposed changes, no harm can result to them from the adoption of these changes.

The nub of the question from the standpoint of the lawyer is the probable effect of these changes upon the prospective lawyer.

Now it is no one's inalienable right to be allowed to enter any particular profession. Such matters are primarily matters of public interest and have been held by the courts over and over again to be proper subjects for the legitimate exercise of the police power of the sovereign.

So, no one having the inherent right to enter into any certain profession, the inquiry next to be determined is whether the proposed changes will be beneficial to the prospective lawyer. We do not believe Justice Ethridge would insist that his children should study at home instead of attending the public grammar schools. So we think that a young man who attends college will be better qualified as a lawyer than the same young man who does not. Of course, there are always exceptions, but we are not dealing here with the exceptional young man. Nor do the proposed changes deal with the exceptional young prospective lawyer. A lawyer needs to know all things, even things unconnected with the law. It is impossible to tell what stray piece of trivial information acquired in college

may years afterward enable a lawyer to win his most important law suit. It is related that someone once asked that noted lawyer, Judge Elbert Gary, former head of the United States Steel Company, what he considered the most useless information he had ever spent time in acquiring and that Judge Gary replied that it was impossible to answer that question, because he had never acquired any useless information. So it is with a lawyer.

A lawyer also needs urbanity, culture, poise, and charm and the average prospective lawyer can acquire these more easily in college than elsewhere. In college he forms those associations that may later be valuable to him in his practice; in solitary study he does not. In college he has the daily exchange of ideas, that daily clash with other minds so typical of his later experience in the practice of law. In solitary study he misses all this. In college he has daily tests of what he learns. A man may cram for an examination on a subject, but no man may cram every day for over a period of years. The writer knows, because he has tried it. In college a man is bound to acquire some knowledge if he stays in college. Surely for the same man a college education is more beneficial than otherwise. I do not rate the benefits of a college education so highly as most people. Rather I take the view that a college education never hurt anybody.

Having determined that the proposed changes would be beneficial to the prospective lawyer, the next question to be determined is whether these changes are unreasonable or undemocratic.

I cannot see how they can be regarded as unreasonable. Certainly it is easier now to get two years of college work than it was to get a high school education twenty years ago. There are several institutions in the State of Mississippi giving such work, and the whole nation is covered with colleges giving such work. Colleges are everywhere in this land of ours, and means of transportation to and from them are increasing yearly. Scholarships are increasing. Colleges are enlarging. Surely it is not exaggeration to say that any young man of good health, average mental equipment and a fair amount of energy and grit can nowadays get a college education and a legal education if he so desires. And surely no other kind of young man or woman should enter the practice of law.

Nor do we think the proposed changes undemocratic. They apply to all alike. The mere possession of money

may make it easier for a boy to get to college, but the money won't give him a college or legal education. Furthermore, the writer thinks he speaks of colleges with a more thorough and more recent fund of information than has Justice Ethridge. The feeling that may once have existed among a foolish and snobbish minority toward a young man working his way through school is rapidly passing away. It is now a most usual thing for a young man to pay a part, or all, of his way through college and law school. In some universities it has even become a mark of merit, and the student who does nothing to pay his own expenses through a college is frequently regarded with a kind of good-natured contempt. Justice Ethridge seems alarmed over the possible domination of our standards of legal admission by Yale and Harvard and seems to share the prevalent misconception that these universities are refuges for the aristocratic and idle rich. Those conversant with the actual facts know that exactly the reverse is true. It is a matter of record that in the past year more than a third of the students in Yale College worked their way partly, or wholly, through school. When the writer was a student there, fifteen years ago, it was a standing joke to say of a certain student: "Oh, he hasn't a chance to make Skull and Bones! (most exclusive and most coveted of Senior Societies). He has gone through college entirely on his father's money!" When the writer graduated from the Yale Law School the young man who defeated the writer and several other aspiring young men for the coveted honor of Summa Cum Laude—first honor man—was a boy who was a member of the same law fraternity as the present Chief Justice of the Supreme Court of the United States and who had worked his way entirely through Law School.

The cold facts are that we have too many lawyers, that there are a number of men who are now practicing law in Mississippi who ought really to be out plowing. I realize that this is not a popular thing to say, but the great majority of our lawyers know it to be a fact. I really think that in his heart of hearts Justice Ethridge believes this himself. According to the last information I have been able to obtain, there are now over fourteen hundred licensed lawyers in Mississippi. Anyone knows that we don't need that many lawyers in Mississippi. The effect of this is that only a few lawyers are really making a decent living from their profession alone. If these pro-

posed changes of the standards of admission result in fewer lawyers being admitted to the practice they will, in my judgment, save the profession in our state. It is a sad but true commentary on human nature that most men are as honest as they can afford to be. From this condition the honest lawyer suffers. Reduce the number of lawyers and those remaining will be of a higher type, there will be fewer shysters and ambulance chasers, and there will be fewer grudge lawsuits and less frivolous litigation to clog the channels of our courts. The lawyers will have more means and more time for study and will become better equipped to practice their profession.

One fear as to the effect of these changes I do share with Justice Ethridge. It is possible that the restriction of the number of our lawyers might result in raising the tariff of fees so high as to be prohibitive to all except the well-to-do. This point has almost been reached in the medical profession. Certainly the standard of fees now prevailing in the legal profession in this state needs to be raised, and such raising is bound to help the standard of the profession. Furthermore, in our profession, we have a very simple corrective that does not exist in the medical profession. If the proposed changes limit the number of lawyers to such an extent—and this could not possibly result in less than ten or twenty years—that the standard of fees becomes unreasonably high, it would be very easy to provide by statute that all fees be fixed in open court after hearing proof by the judge of the trial court, subject to review by the appeal court. These judges are all elected by the people and it is not necessary to detail what would happen to any judge who got into the habit of giving to lawyers unreasonably large fees.

However, the writer agrees with Justice Ethridge, that the really important question regarding these proposed changes is not whether they would benefit the lawyers, but whether they would benefit the general public. The writer is in favor of the proposed changes because he believes so strongly that they would be most beneficial to the general public of Mississippi. Real Democracy is not subserving the interest of a very small minority who may want to become members of a certain profession, but in bringing the greatest good to the greatest number.

The public would benefit from more ethical lawyers, from lawyers who were not continually pressed for money, from lawyers who had the historic background of their

profession, who knew not only what the law was but what the law had been and why. The lawyers would be more competently trained, more able to correctly advise their clients, and numerous lawsuits would be prevented. Because the lawyers would be better lawyers we would have better judges and the courts would work more justly and more rapidly. All of these things would be to the benefit of the great public who never desire nor expect to be lawyers.

Finally, we are in the position of attempting to face a rising and overwhelming wave. The standards of admission to the practice of law are being raised everywhere. This results naturally in a rush of the shallow and dishonest prospective lawyers to the states with lower standards. If we do not raise our standards of admission to the profession we shall eventually be deluged with an ignorant and unscrupulous lawyer. Are we going to subject the people of Mississippi to this danger, or are we going to take steps in time?

In conclusion, with all due deference, it seems to the writer that Justice Ethridge is suffering subconsciously from that complex which is so often the greatest defect of democracy—unreasoned prejudice against the expert. Great liberals have often pointed out that the success of the Labor Party in Great Britain is due mainly to the ability of hardened labor leaders like Ramsay MacDonald, J. R. Clynes, and Jim Thomas to work amicably with financial experts like Philip Snowden, economic students like Beatrice and Sydney Webb, and social philosophers like Bernard Shaw.

Democracies cannot afford to shun their experts, and cannot afford to have them badly trained. If brains cannot save the democratic idea, sooner or later it is bound to perish.

We sincerely favor the proposed changes because we believe they tend to bring about the greatest good of the greatest number of the people of Mississippi.

IS A LIFE INSURANCE COMPANY LIABLE IN TORT FOR SO-CALLED NEGLIGENCE IN ITS AGENTS NOT PROMPTLY FORWARDING APPLICATIONS FOR LIFE INSURANCE, OR FOR DELAY IN THE HOME OFFICE IN PASSING UPON SUCH APPLICATIONS, OR FOR DELAY IN FORWARDING AND HAVING DELIVERED SUCH POLICIES AFTER ISSUANCE?

By W. Calvin Wells*

PRECEDENT

One day through the primeval wood
A calf walked home, as good calves should;
But left a trail all bent askew,
A crooked trail, as all calves do.

Since then, three hundred years have fled,
And, I infer, the calf is dead.
But still he left behind this trail,
And thereby hangs my moral tale.

The trail was taken up next day
By a lone dog that passed that way;
And then a wise bell-wether sheep
Pursued the trail o'er vale and steep,

And drew the flock behind him too,
As good bell-wethers always do.
So from that day, o'er hill and glade,
Through those old woods a path was made.

And many men wound in and out,
And bent and turned and dodged about,
And uttered words of righteous wrath,
Because 'twas such a crooked path;

But still they followed—do not laugh—
The first migrations of that calf,
And through this winding woodway stalked
Because he wabbled when he walked.

This forest path became a lane,
That bent and turned and turned again;
This crooked lane became a road,
Where many a poor horse, with his load,

Toiled on, beneath the burning sun,
And traveled some three miles in one.
And thus a century and a half
They trod the footsteps of that calf.

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The years passed on with swiftless fleet,
The road became a village street,
And this, before men were aware,
A city's crowded thoroughfare.

And soon the central street was this
Of a renowned metropolis.
And men two centuries and a half
Trod the footsteps of that calf.

Each day a hundred thousand rout
Followed the zigzag calf about;
And o'er his crooked journey went
The traffic of a continent.

A hundred thousand men were led
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;

For thus such reverence is lent
To well-established precedent.
A moral lesson this might teach,
Were I ordained and called to preach.

For men are prone to go it blind
Along the calf-paths of the mind,
And toil away from sun to sun
To do what other men have done.

They follow in the beaten track,
And out and in, and forth and back,
And still their devious course pursue
To keep the path that others do.

But how the wise old wood-gods laugh,
Who saw the first primeval calf!
Ah! many things this tale might teach;
But I am not ordained to preach.

I yield to no one in my respect for the administration of justice in the courts of our land.

I believe that I appreciate as fully as anyone the great contribution made by the courts, both English and American, in promoting the life, liberty, happiness, and protection of property rights of the people of those nations.

In quoting the above parody and parable and in applying it to at least one legal principle, originated, developed and declared in some of the highest courts of the various states of the American Union, I do not wish its application to be too broad, nor would I have any reader of this paper rashly draw the conclusion that in any considerable number of instances have courts blindly followed illogical precedents and established principles of law which are founded upon no reasonable basis.

This paper, however, will treat with the origin and growth of such a principle of law established in a number

of the states of the Union, but very recently rejected in toto by the Supreme Court of Mississippi.

The Mississippi case which I have in mind is that of *Savage, Administrator, etc. vs. Prudential Insurance Company et al.,* decided April 8, 1929, and reported in 121 So. 487.

This case was interestingly, but very briefly, digested by Mr. Jason H. Floyd in the Mississippi Law Journal of date November, 1929, appearing on pages 254 and 255.

A holding, by any court, of liability for such so called negligent delay on the part of any life insurance company or its agents would have to be founded upon a breach of legal duty imposed either by the statute law, the common law, or by judicial legislation.

So far as I have been able to ascertain, the statutes of none of the States of the Union impose or undertake to impose any such liability.

It is extremely doubtful to me as to whether legislation undertaking to impose such liability is constitutional. On the contrary, I believe that such legislation would violate the Fourteenth Amendment to the Constitution of the United States.

Of course, any statute undertaking to do so would have to be enacted by the legislative branch of the government of the various states, undertaking to proceed under its police powers.

It is true that the Supreme Court of the United States in the case of *National Fire Insurance Company vs. Wanberg,* 260 U. S. 71, held some such similar legislation with reference to hail insurance companies, enacted by the Legislature of North Dakota, not violative of the Fourteenth Amendment to the Constitution of the United States, but that such statute went to the extreme limit of the police powers of the State by legislative act.

Under the common law, as it appears to me, such holding of liability for negligent delay can not be legally imposed, as there is no legal duty imposed by the common law upon a life insurance company to act promptly or at all in such matters, and, in the absence of such legal duty, a violation thereof can not amount to a tort.

There is no legal duty imposed upon a life insurance company to insure any or all applicants for life insurance.

I shall endeavor hereinafter to establish the above proposition, for if established it appears to me there can be

no difference of opinion but that there can be no liability under the common law for such so-called negligent delay.

I shall also undertake further on in this paper to establish that all cases holding to such a proposition of liability constitute purely and solely judicial legislation, unsound in principle and illogical and unreasonable so that it should not be established in any other states of the Union, but that, on the contrary, cases holding to the theory of liability should be overruled by the courts of those states where heretofore established.

Until presented to the Supreme Court of Mississippi in the above styled Savage-Prudential Insurance Company case, in 1929, the exact legal proposition involved in this paper was never presented to that court. Very similar propositions, closely approaching it, were presented in several cases. In *Jacobs vs. New York Life Insurance Company,* 71 Miss. 658, the court held, as set forth in the syllabus, as follows, to-wit:

"Where an applicant for insurance stands a satisfactory medical examination, and pays a stated sum, taking from the agent of the company a receipt, stipulating that if the application 'for insurance to take effect from this day' is approved, and a policy issued, the money is to be applied in payment of the first semi-annual premium; but 'that, if said application is not approved and accepted, said company shall incur no liability, and said sum is to be returned on surrender of this receipt,' and the applicant dies while the company is considering the application, and it is not approved, the company incurs no liability. So held on demurrer to a declaration alleging that the application was refused arbitrarily and without cause."

As above set forth, the gist of that action was wilful, wanton, wrong alleged to have been committed by the defendant Insurance Company in refusing arbitrarily and without cause to issue the policy.

The entire opinion in this case is so short, less than one-half a page, and is such a typical opinion of that great Chief Justice, J. A. P. Campbell, that I here set it forth:

"There is no escape from the plain stipulation of the contract 'that, if said application is not approved and accepted, said company shall incur no liability thereunder,' and the fact that said application was not approved and accepted, but the applicant died while the company was considering the application. It had incurred no liability, and cannot be held bound as if it had.

"We have examined the cases cited for the appellant, but they fall far short of maintaining the liability of the company. The denial of all liability by the company, on the facts of this

case, does not need the support of adjudication and we have not examined any, preferring to rest with perfect confidence on the unmistakable meaning of the written agreement, which no number of books or extent of ingenious argument could change so as to create liability, except on the terms it expresses."

The case of *New York Life Insurance Company vs. McIntosh,* 86 Miss., page 236, clearly and distinctly reaffirms the above doctrine in words that cannot be misunderstood.

The Court held, as set forth in the syllabus, page 236, as follows, to-wit:

"Contracts. Meeting of the minds. Insurance. Propositions and counter propositions do not make a contract; before either party is bound, the proposition of one of them must be accepted by the other exactly as proposed; there must be a meeting of the minds on the same thing; and this is true of insurance as of other contracts.

"Where plaintiff's deceased husband applied for a life policy, paid the amount of the first annual premium, and obtained a receipt, which the company agreed to accept as cash in payment of the first premium, and, if the policy was not issued within sixty days, the amount paid would be returned on surrender of the receipt to the company; and the policy applied for was not issued, but a different policy tendered and refused, and, after certain further evidence of insurability was furnished, a more favorable policy was sent to insurer's agent to be tendered, but, insured being sick at the time, it was never delivered, and insured died soon after, these facts did not establish a meeting of minds, and no contract of insurance was ever effected."

The entire opinion in that case sweeps aside all fallacious and ingenious appeals and clearly lays down the law as follows, to-wit:

"The learned chancellor erred in finding that appellant agreed or contracted with appellee's testator to issue a policy of insurance upon his life in accordance with his written application. It refused his application for a standard policy, and offered him a policy of a lower class. This was declined by him. Appellant then decided to offer him another policy, which, while better than the one declined by him, was not the policy for which he had applied. He died before he had an opportunity to determine whether he would accept it. Thus it is perfectly evident that the minds of the parties never met, and that no contract for insurance was ever effected. Reversed and remanded."

Again, in a fire insurance case where a local agent has the power to sign and countersign policies and to make contracts of fire insurance verbally or in writing, where

the power of the agent is tremendously more full and plenary than in the case of a life insurance agent, the Supreme Court of Mississippi again laid down the rule in the case of *Scottish Union, etc. vs. Warren Gee Lumber Company,* 80 So., page 9, as follows, to-wit:

"8. Insurance. Execution of Contract—Requisites. To constitute an insurance contract, the minds of the parties must meet."

And in the opinion in the said case, supra, page 13, the Court held as follows, to-wit:

"To constitute an insurance contract the minds of the parties must meet as to the terms of the contract. It is not essential that the premiums on the policies be paid, or that the policies be actually delivered to the insured, before the contract becomes effective. Insurance Company vs. Lumber Co., 94 Miss. 159, 47 So. 551; Insurance Co. vs. Wylie, 110 Miss. 681, 70 So. 835; Insurance Co. vs. Alexander, 12 So. 25; Insurance Co. vs. McIntosh, 86 Miss. 236, 38 So. 775."

In another fire insurance case the Supreme Court of Mississippi, in the case of *Newark Fire Insurance Co. vs. Russell,* 107 So., page 417, decided March 22, 1926, held as follows, to-wit:

"There was no insurance where application was not shown to have been approved by company at central office as conditioned.

"The written application and oral testimony showing that giving of insurance was conditioned on the application being approved by the company at the central office, and such approval not being shown and no policy being issued, there was no contract of insurance."

Presiding Justice Holden, with his keen analysis, went to the very vitals of the proposition and held to the old rule that no recovery could be had upon an application for insurance which had to be approved at the Home Office of the Company, notwithstanding the fact that the premium had been paid in advance, the application had been forwarded to the Home Office at Atlanta and the applicant heard nothing from the application until the residence was destroyed by fire some two months after the date of the application, after which time the note and the application were returned to the applicant, Russell, marked cancelled. No acceptance or rejection of the application had ever been communicated to the applicant, and, as above stated, two months had elapsed before the fire.

An effort was made to recover on an oral contract of insurance, but this court held, brushing aside all sophistry,

that the recovery, if any, depended upon the contract sought to be obtained upon the application and the approval thereof at the Atlanta office, and although two months had elapsed with no action taken thereon, no recovery could be had because there was no accepted application and a resulting contract and meeting of the minds.

Way back in 1854 the Supreme Court of Pennsylvania settled this question and a practically unbroken line of decisions upholds the doctrine laid down in that case. In that case, to-wit, *New York Mutual Ins. Co. vs. Johnson,* 23 Pa. 72, the Court held as follows, to-wit:

The failure for six months to refund the amount paid as a premium and to give notice that the application had been rejected was held not to constitute an acceptance, the Court said:

"But it is said that the loss did not take place for nearly six months after the application, and that during all that time the defendants neglected to refund the money, and to notify the plaintiffs that their proposal was rejected. And this is thought to be such negligence on the part of the defendants below as justifies and requires the inference that they had approved or accepted the proposal, and here is the root of the error of the court below. A principal is bound by the authorized acts of his agent, whether notified of them or not, and therefore, the defendants are chargeable with having received this proposal; but that does not help the plaintiffs, for receiving it is not an acceptance of it. A principal is also bound by the unauthorized acts of his agent, if, on being notified, he does not disavow them; but neither does this help the plaintiffs, for the agent made no contract to insure, and, even if he did, no notice of such contract is proved. What is the true effect of the delay? It cannot of itself make a contract. A proposal cannot become a contract by delay in rejecting or answering it. A delay in paying $25.00 cannot make a man liable for $2,500.00. A neglect or delay that has properly a tendency to mislead another, and which is incompatible with honesty, may be charged as a ground of liability; as where one knows that another is acting as his agent in a particular manner, without or beyond his authority, and does not promptly disavow his acts. But in this case the plaintiffs had in their own hands the power of correcting the delay; for undue delay in accepting a proposal may be, and ought to be, treated as a rejection of it, and the proposer may refuse to be bound by a tardy acceptance. A proposal not answered remains a proposal for a reasonable time, and then is regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attend to it with reasonable diligence.

"It is a well settled rule, established by a great weight of authority, that mere delay in passing upon an application for insurance cannot be construed as an acceptance thereof by the insurer which will support an action ex contractu."

To the same effect are the following authorities:

United States.—*Kohen vs. Mutual Reserve Fund Life Ass'n* (1886), 28 Fed. 705; *Misselhorn vs. Mutual Reserve Fund Life Asso.* (1887), 30 Fed. 545; *Equitable Life Assurance Society vs. McElroy* (1897), 28 C. C. A. 365; 49 U. S. App. 548, 83 Fed. 631.

Alabama.—*Alabama Gold Life Ins. Co. vs. Mayes* (1878), 61 Ala. 163.

Georgia.—*New York Life Insurance Co. vs. Babcock* (1898), 104 Ga. 67; 42 L. R. A. 88; 69 Am. St. Rep. 134; 30 S. E. 273.

Idaho.—*Easley vs. New Zealand Ins. Co.* (1897), 5 Idaho 593; 51 Pac. 418.

Illinois.—*Winnesheik Ins. Co. vs. Holzgrafe* (1870), 53 Ill. 516; 5 Am. Rep. 64.

Iowa.—*Winchell vs. Iowa State Ins. Co.* (1897), 103 Ia. 189; 172 N. W. 503.

Kentucky.—*Northwestern Mutual Life Ins. Co. vs. Neafus* (1911), 145 Ky. 563; 36 L. R. A. (N. S.) 1211; 140 S. W. 1026.

Maryland.—*Harp vs. Grangers' Mutual Fire Ins. Co.* (1878), 49 Md. 307.

Minnesota.—*Heiman vs. Phoenix Mutual Life Ins. Co.* (1871), 17 Minn. 153, 10 Am. Reps. 154; Gil. 127.

Nebraska.—*St. Paul F. & Marine Ins. Co. vs. Kelley* (1902), 2 Neb. (unof.) 720; 89 N. W. 997; *Handlier vs. Knights of Columbus* (1911), . . . Nebraska . . . , 183 N. W. 300.

New York.—*More vs. New York Bowery F. Ins. Co.* (1892), 130 N. Y. 538; 29 N. E. 757; reversing (1890) 55 Hun. 540; 10 N. Y. Supp. 44.

North Carolina.—*Ross vs. New York Life Ins. Co.* (1899), 124 N. C. 395; 32 S. E. 733.

Oklahoma.—*Van Arsdale vs. Young* (1908), 21 Okla. 151; 95 Pac. 778; *Dorman vs. Connecticut F. Ins. Co.* (1914), 41 Okla. 509; 51 L. R. A. (N. S.) 873; 139 Pacific 262; *Shawnee Mut. Fire Ins. Co. vs. McClure* (1913), 30 Okla. 535; 49 L. R. A. (N. S.) 1054; 135 Pac. 1150.

Pennsylvania.—*New York Union Mutual Ins. Co. vs. Johnson* (1854), 23 Pa. 72; *Ryan vs. Prudential Ins. Co.* (1907), 33 Pa. Super. Ct. 364; *Ripker vs. Mutual F. Ins.*

Co. (1908), 36 Pa. Super. Ct. 517; *Somerset County Mutual F. Ins. Co. vs. May* (1875), 2 W. N. C. 43.

South Dakota.—*Brink vs. Merchants & F. United Mutual Ins. Asso.* (1903), 17 S. D. 235; 95 N. W. 929.

Tennessee.—*Richmond vs. Travelers Ins. Co.* (1910), 123 Tenn. 307, 30 L. R. A. (N. S.) 954; 130 S. W. 790.

Texas.—*Connecticut Mutual Ins. Co. vs. Rudolph* (1876), 45 Tex. 454.

Virginia.—*Haskin vs. Agricultural Fire Ins. Co.* (1884), 78 Va. 700; *Haden vs. Farmers & M. Fire Asso.* (1885), 80 Va. 683.

An application to an insurer for a policy is a proposal or offer on the part of the applicant to enter into a contract with the insurer (Vance on Ins., Sec. 56). Where the applicant agrees, that "the insurance applied for shall not take effect unless . . . the policy is delivered to and received by me (applicant) during my lifetime and good health," it is manifest that no effective acceptance of the offer is made, resulting in a contract of insurance, unless there is a delivery to, and receipt by, the applicant of the policy. Under the stipulation quoted, "delivering" the policy—or, more accurately, its delivery and receipt—is "insuring" the applicant, for delivery is the essential act effecting the insurance. If defendant owed no duty to insure the applicant, it owed none to deliver the policy either within a reasonable time, or at all.

The rule, generally, in respect to contractual negotiations, is that there is no legal duty on the part of one to whom an offer is made either to accept or reject it, or to give it prompt or any attention, so that there can not be actionable negligence or a tort based on any neglect to act upon the offer. The offerer is at liberty any time he sees fit to withdraw the offer and is not bound by it before its acceptance (16 Am. & Eng. Enc. Law 851), and likewise the offeree is under no legal obligation by reason of the receipt of the offer to accept or reject it or make any communication in respect to it to the offerer. Page on Contracts, Sec. 42.

The foregoing rules as affecting an application for life insurance are stated in substance in *Travis vs. Nederland Life Ins. Co.,* 104 Fed. (C. C. A. 8th Cir.) 486, as follows (p. 488):

"An application for life insurance is not a contract. It is only a proposal to contract on certain terms which the company to which it is presented is at perfect liberty to accept or

to reject. It does not in any way bind the company to accept the risk proposed, to make the contract requested, or to issue a poplicy. Nor does it in any way bind the applicant to take the policy, to make the contract he proposed, or to pay the premium until his proposal has been accepted by the company and its policy has been issued. . . . The applicant may withdraw his application and refuse to take the insurance on any terms.''

Clearly no tort is committed by an offeree who fails to accept or reject the offer, or to give notice of its acceptance or rejection within a reasonable time, or at all.

But the contention, or at least suggestion, of proponents of this doctrine is that the insurance business is a public calling or employment, and that a life insurance company is a public service corporation under the duty of serving all comers, just as a common carrier or a public utility, or other distinctively public company is. It is suggested that the rule applicable to life insurance companies is, or should be, that they must insure all applicants who are acceptable risks, and that their failure or refusal to do so within a reasonable time after submission of applications is a breach of a legal duty. A review of the decisions from earliest times, however, demonstrates the fallacy of such contention.

The common law in medieval England regulated numerous so-called public services or callings. For the purpose of setting forth rules of the common law governing public services, so far as deemed necessary, I shall quote freely from Wyman-Public Service Corporations.

Among the employments or callings regulated by the common law were those of the surgeon, tailor, smith, victualer, baker, carrier, miller, innkeeper, ferryman and wharfinger. Regulation was necessary because these employments were carried on under conditions of virtual monopoly. Frequently there was but one surgeon or miller or smith or baker in a given district and if one of these refused his services to a member of the community, the latter's loss or damage might be irreparable.

Wyman on Public Service Corporations, Secs. 1 to 15.

With the advance of civilization and changed economic conditions some of these callings ceased to be monopolistic, and the common law no longer treated them as public. Thus, as surgeons or doctors increased in number in each district or community, their services ceased to be ''public'' or ''common'' in contemplation of the

common law, and no action would lie, and does not now, for their refusal to accept any patient who calls.

Wyman on Public Service Corporations, Sec. 6.

Hurley vs. Eddingfield, 156 Ind. 415, 59 N. E. 1058.

Under the modern law a baker may refuse to sell bread to a starving man, though he tenders payment.

Wyman on Public Service Corporations, Sec. 9.

Brewester vs. Miller, 101 Ky. 368, 41 S. W. 301.

Like situations developed with reference to other callings originally deemed "public" by the common law.

"Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern times does not require it; but innkeeper, carrier, ferryman and wharfinger are still in that classification, since even in modern business the conditions require them to be so treated."

Wyman on Public Service Corporations, Sec. 20.

The important difference between public callings and private business was and is that "those in a public calling have always been under the extraordinary duty to serve all comers, while those in private business may always refuse to sell if they please."

Wyman on Public Service Corporations, Sec. 1.

"The characteristic thing, then as now (of the law governing public services) was the legal imposition of an affirmative duty of proper actions upon those who openly professed a public employment, while those who carried on private business were under practically no duties which were not purely negative in character."

Wyman on Public Service Corporations, Sec. 4.

The regulation or control of public services or employments under the common law consisted in the enforcement of the rules "that all must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made."

Wyman on Public Service Corporations, Sec. 39.

The basis or reason for the common law control of public employments was the fact that they were conducted under conditions of virtual monopoly. When the monopoly ceased, the control was no longer exercised. Professor Wyman, after considering the various public services subject to common law control, said:

"It will have been noticed, therefore, that the principle of law which permits the regulation of these callings has never been abandoned, though the conditions calling for its application at various times have greatly changed. Whenever the public is subjected to a monopoly the power of oppression inherent in a monopoly is restricted by law. Whenever, on the

other hand, competition becomes free, both in law and in fact, the need of governmental regulation ceases; public opinion ceases to demand such regulation and the law withdraws it."

Wyman on Public Service Corporations, Sec. 29.

"A review of all the instances which have been cited in the course of this whole discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do. . . . It is submitted that any business is made out to be public in character where there is a virtual monopoly inherent in the nature of things. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature."

Idem, Sec. 156.

In modern times notable instances of public services are those of the public utility companies, such as gas, telephone, telegraph and electric light companies. These businesses are largely regulated by statutes, but where these are not controlling they are subject to the rules of the common law that they must serve all applicants, must charge reasonable rates and practice no discrimination. But this common law control is based upon the universally recognized fact that these businesses are operated under conditions virtually monopolistic.

See:

Weld vs. Gas, etc., Comrs., 84 N. E. (Mass.), 101, 102.

Owensboro, etc., Co. vs. Hildebrand, 42 S. W. (Ky.) 351.

Cincinnati, etc., Co. vs. Bowling Green, 49 N. E. (Ohio) 121, 123.

Snell vs. Clinton Electric Light Co., 196 Ill. 626, 63 N. E. 1084.

State vs. Nebraska Tel. Co., 17 Neb. 126, 22 N. W. 237, 238.

Cumberland, etc., Co. vs. Kelly, 160 Fed. 316, 318, 319.

There are numerous businesses or services, which are affected with a public interest. They include not only monopolistic services to which reference has been made, but others, not necessarily monopolistic in character, but of public concern and interest, upon which ground their legislative control or regulation, under the police power of the State, is justified.

The control of callings or businesses, based upon the ground that they are affected with a public interest, is solely for the legislature in the exercise of the police

power, which is a power vested exclusively in the legislature.

Toledo, etc., Co. vs. Jacksonville, 67 Ill. 37, 40.

Commonwealth vs. Alger, 7 Cush. (Mass.) 53, 85.

12 Corpus Juris, p. 904, Sec. 412, p. 912; Sec. 424, p. 932; Sec. 443.

In the leading case of *Munn vs. Illinois,* 94 U. S. 113, all elevators or storehouses in that State where grain or other property was stored for compensation were declared by the constitution of Illinois to be public warehouses; statutes afterward enacted, regulated the compensation for the storage of grain, were upheld as valid by the Supreme Court upon the ground that the business was affected with a public interest. But the Supreme Court was upholding legislative and not judicial action.

In the case of *Cotting vs. Kansas City Stock Yards Co.,* 183 U. S. 79, the Court holding valid a statute of Kansas, defining public stock yards and regulating the charges thereof said, referring to the stock yards company (page 85):

"While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest and therefore must be considered as subject to governmental regulation."

But the "governmental regulation" in question was legislative and not judicial.

In the comparatively recent case of *German Alliance Ins. Co. vs. Kansas,* 233 U. S. 389, an act of the legislature of Kansas regulating fire insurance rates was upheld on the ground that the business of fire insurance was affected with a public interest. Three members of the Supreme Court dissented, however, upon the ground that in their opinion not even the legislature consistently with the Fourteenth Amendment to the Federal Constitution, could regulate rates in a business of the more or less private character of fire insurance, involving only personal contracts of indemnity.

As illustrating the necessity of a statutory enactment to accomplish the end sought by plaintiffs in these cases, attention is again called to the case of *National Union Fire Ins. Co. vs. Wanberg,* 43 Sup. Ct. Rep. 32, decided October 6, 1922, which we have heretofore referred to. A statute of North Dakota was involved, providing that "every insurance company engaged in the business of insuring against loss by hail in this State shall be bound,

and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective. Chief Justice Taft in discussing the contention that by this statute "mandatory obligation is substituted for freedom of contract," contrary to the Fourteenth Amendment, said (p. 33):

"We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it. . . . The legislature was evidently convinced that it would help the public interest if farmers could be induced generally to take out hail insurance and 'temper the wind' so injurious to the agriculture of the State, and that they would be more likely to avail themselves of this protection if they could effect the insurance promptly and on the eve of the danger. . . . Whether it is wise legislation is not for us to consider. All we have to decide and that we do decide, is that it is not so arbitrary or unreasonable as to deprive those whom it affects of their property or liberty without due process of law."

In the Express cases, 117 U. S. 1, 29 L. Ed. 791, the Supreme Court, reversing a decree of the lower court requiring a railroad company, in the absence of a statute or contract, to furnish certain specified facilities to an express company doing business on its road, said (p. 29):

"The regulation of matters of this kind is legislative in its character, not judicial. . . . The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts can not be called on to give it effect."

In *American Livestock Com'n Co. vs. Stock Exchange,* 143 Ill. 210, 32 N. E. 274, the Court said (32 N. E. 282):

"Ordinarily the adoption of new rules of public policy or the application of existing rules to new subjects is for the legislature and not for the courts. Accordingly it may be held to be a general, though perhaps not an invariable, rule, that the question whether a particular business, which has hitherto been deemed to be private, is public, and impressed with a public use, is for the legislature."

The court in that case, referring to the Chicago Livestock Exchange, said that the character and magnitude of its business were such as "to warrant the legislature in the exercise of its legislative discretion in declaring a pub-

lic use, and placing said business under local control and supervision, but such power, in our opinion, does not rest with the courts."

32 N. E. 282.

In *Ladd vs. Mfg. Co.,* 53 Tex. 172, the Court said:

"If the magnitude of a particular business is such, and the persons affected by it are so numerous, that the interests of society demand that the rules and principles applicable to public employment should be applied to it, this would have to be done by the legislature (if not restrained from doing so by the constitution) before a demand for such use could be enforced by the courts."

See also:

Delaware, etc., Co. vs. Central Stockyards Co., 45 N. J. Eq. 50, 17 Atl. 146, 149.

Woodman vs. Sloss, 49 Colo. 177.

Wheatfield vs. Aetna Life Ins. Co., 205 U. S. 489, and *N. W. Nat. Life Ins. Co. vs. Riggs,* 203 U. S. 243, involving the limitation or restriction of the contractual rights of insurance companies in which the limitations challenged, but upheld by the courts, dealt with restrictions which were statutory. In one of these cases (49 Colo. 177) the Court, in considering the contention that a statute, providing that suicide should not be a defense to an action on a life policy, was unconstitutional, in that it infringed the personal right of a citizen to make a contract which was neither immoral nor against public policy, said (page 183) that the "enactment of the statute was a legitimate exercise of power by the State legislature" and further, that "the propriety and wisdom of the enactment was for the legislature alone, and is not properly for consideration or review here."

In *N. W. Nat. Life Ins. Co. vs. Riggs,* 203 U. S. 243, it is said (page 254):

"The business of life insurance is of such a peculiar character, affects so many people, and is so intimately connected with the common good, that the State creating the insurance corporations and giving them authority to engage in that business, may, without transcending the limits of legislative power, regulate their affairs, so far, at least, as to prevent them from committing wrong or injustice in the exercise of their corporate functions."

The insurance business, under the authorities, is one affected with a public interest and there is in all the States an extensive body of legislation relating to it enacted upon that theory. But notwithstanding all the checking and safeguarding, the legislature has not gone so far as to

require insurance companies to insure all qualified applicants or to require the delivery of policies whereby the contract of insurance is effected, within a reasonable or any time.

In the case of *Musselhorn vs. Mutual Reserve,* 30 Fed. 554, decided in 1887, Justice Brewer of the United States Supreme Court, while sitting on the Circuit Bench held as follows, to-wit:

"The plaintiff, however, insists that there was delay—culpable delay—on the part of the insurance company in acting on the application. The application and examination were completed, as I stated, on December 4. For some reason the application did not reach New York City until December 18. Concede that there was unreasonable delay and yet I do not see how any delay makes a contract in the face of the stipulation (that a policy shall not be in force until signed by the company and delivered to the applicant). If the applicant was dissatisfied and the delay unreasonable, he could have recovered the money which he paid.

"While the receipt of the application may cast a moral duty upon the company to act promptly, yet delay does not operate in the same way as an acceptance of the application. Suppose the company had delayed acting for a year, could it be claimed that the policy was in force? The proposition which the applicant made was for a policy to become operative when the instrument was executed and delivered. No negligence, no delay, reasonable or unreasonable, on the part of the insurance company, could make a contract in the face of the stipulation."

To the same effect is the case of *Kohen vs. Mutual Reserve,* 28 Fed. 705, decided by Justice Brewer in 1886.

What Justice Brewer thus said had reference, of course, to the question at issue in an action to enforce the alleged contract. He decided that mere delay was not the equivalent of acceptance, and therefore did not make a contract. However, it is interesting to note that the only duty to act promptly which this learned jurist "kenned" was a moral duty, and not a legal duty or a duty imposed by law, absent which there can be, I maintain, no breach which will rise to the dignity of a tort.

The insurance business is not monopolistic in character, there being hundreds of life insurance companies doing business in Mississippi and in all the other states of the Union and the common law rule requiring of monopolistic businesses service to all is not applicable to it. No decision of any court holds that rule applicable to this business and there is no statute requiring insurance companies to insure all qualified applicants. The result is that the

legal duty essential to the tort attempted to be stated in these cases is entirely wanting.

I submit, therefore, that upon reason the contention of liability involved in the tort theory for alleged actionable negligence cannot be sustained.

Turning now to authorities from the Courts of last resort of other states, I submit the following:

In *National Union Fire Ins. Co. vs. School District,* 182 S. W. (Ark) 547, it is held that mere delay in passing on an application for a policy could not be construed into an acceptance of the application and that a cause of action for negligence could not be based on such delay. The Court said (182 S. W., p. 548):

"The only issue presented by this appeal is whether or not an insurance company is liable for the negligence of its agent in failing to send to the company an application for insurance, where the only authority of the agent is to solicit applications for insurance, to deliver policies when issued, and to receive and receipt for initial premiums.

"When an agent acts within the scope of his authority, the principal is bound. Railway vs. Ryan, 56 Ark. 247, 19 S. W. 839.

"Now in the written application of appellee for a policy of insurance it is stated:

" 'It is understood and agreed that this application shall not be construed as a contract of insurance against said company until same shall be approved by the officers of said company, which approval shall be evidenced by the issuance and delivery of its policy.'

"Under the express terms of this proposal on the part of appellee for insurance it is stipulated that there shall be no contract of insurance until the company shall approve the application and evidence its approval by the issuance of a policy. Under this stipulation of appellee, even if the soliciting agent had promptly forwarded the application to the company, the latter was under no legal obligation to issue the policy to appellee. The authority of the soliciting agent to receive and forward the application if strictly followed did not impose upon the appellant any legal duty.

"If the application had been promptly transmitted and received, appellant would not have been liable until the policy was actually issued. Cooksey vs. Mutual Life Ins. Co., 73 Ark. 117, 83 S. W. 317, 108 Am. St. Rep. 26; People's Mut. Ins. Co. vs. Powell, 98 Ark. 166, 135 S. W. 823. Negligence and liability therefor cannot be predicated upon a state of facts that do not impose any legal duty.

"The better reason and the decided weight of authority supports the doctrine that mere delay in passing upon an application for insurance cannot be construed as accepting such ap-

plication and consenting to be bound for the insurance sought by it, nor can a cause of action for negligence be grounded upon such delay. Alabama Gold L. Ins. Co. vs. Mayes, 61 Ala. 163, and other cases cited in appellant's brief."

In *Interstate Ass'n vs. Nichols,* 220 S. W. (Ark.) 477, it appeared that the policy was not to become effective until fifteen days after its date; it was held that negligent delay by the company in approving the application and writing the policy creates no liability to insured, who became sick within fifteen days after the date of the policy. The court quoted from *National Union Ins. Co. vs. School District, supra,* to the effect that "the better reason and the decided weight of authority supports the doctrine that mere delay in passing upon an application for insurance can not be construed as accepting such application . . . nor can a cause of action for negligence be grounded upon such delay."

In *Bradley vs. Ins. Co.,* 295 Ill. 381, 129 N. E. 171, it was held that where an applicant for accident insurance was accidentally killed some time after making his application but before the company's agent transmitted it to the company, no right of action for the agent's negligent delay could accrue to the applicant's administrator. The Supreme Court of Illinois said in its opinion, which was handed down on December 21, 1920:

"The difference between that case (the Boyer case) and the Duffy case and the case under consideration here is that, if any action accrued to anyone it accrued to Boyer in his lifetime and the suit was prosecuted by him. Northwestern Mutual Life Ins. Co. vs. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211, was an action on an alleged contract of insurance, and we do not consider some things that were said in the opinion as pertinent to the question involved. In Wilken vs. Capital Fire Ins. Co., 99 Neb. 828, 157 N. W. 1021, the court followed the decision in the Duffy case, three justices dissenting, and in the later case of Myer vs. Central States Life Ins. Co., 103 Neb. 640, 173 N. W. 578, the same court declined to follow the Wilken case and held that an action of tort would not lie for a refusal to make a contract. In National Union Fire Ins. Co. vs. School District, 122 Ark. 179, 182 S. W. 547, L. R. A. 1916 D 238, the Supreme Court held a cause of action for negligence could not be predicated upon mere delay in passing upon an application for insurance."

Again the Supreme Court of Appeals of Virginia on March 15, 1923, held, in the case of *Northern Neck Mutual, etc. vs. Turlington,* 116 S. E., page 363, as follows, to-wit:

"We think it perfectly clear that this case comes within the principles stated in the cases last cited. Here was a mutual insurance company, with a by-law expressly providing that there should be a written application filed by every person who wished to insure in the association; that he as a preliminary should sign the application and thereby agree to conform to all the rules and regulations of the association as they might from time to time be enacted; that the application should be recommended by some person in the locality of the property acceptable to the secretary; that the application should be forwarded to the secretary at the home office for his approval; and that no recovery could be had for loss or damage occurring prior to noon of the day of the approval of the application of the secretary. In this case none of these prerequisites to the contract of insurance exist. There was no written application, no agreement as to the term of the insurance, though it may be inferred, possibly, that it was intended to be for one year, no premium paid, no notice either to the district agent or to the company. The burden is upon the plaintiffs to establish the alleged contract for the insurance with the company, and, taking the most favorable view of the testimony, all that appears is that there was negligence and delay on the part of the subagent, whose powers were limited and defined, in failing to write up the application, present it to the plaintiffs for signature, and that neither his immediate principal, Adams, nor the company were notified of the alleged contract; but mere negligence and delay on the part of such an agent does not establish a contract with the company.

"The view here indicated is well supported by authority in other jurisdictions, and they are collected in the notes in 15 A. L. R., pp. 995, 1026.

"Our conclusion then is that the trial court clearly erred in giving the instruction asked for by the plaintiffs, in refusing the instructions (c), (d), and (e), offered by the company, and in overruling the company's motion to set aside the verdict as contrary to the law and the evidence. This court will therefore enter here such judgment as to this court seems right and proper; that is, in favor of the defendant company. Code, Sec. 6365. Reversed."

In the case of *Welch vs. Life Insurance Company of Virginia,* 117 S. E., page 720, the Court held as follows, to-wit:

"This action was begun by the service of the summons and complaint, July 6, 1921. The action was for damages because of the failure to deliver an insurance policy on the life of Augusta R. Welch, in which the plaintiffs as father and mother of Augusta, were to be beneficiaries. The complaint alleged that in January, 1920, Augusta R. Welch signed an application for the insurance; that she stood the medical examination; that

the application and certificate of examination were forwarded to the Home Office of the appellant at Richmond, Va., and it issued a policy for $1000.00 and mailed it to its Greenville agents for delivery; that Augusta R. Welch died March 11, 1920, without the policy having been delivered, and such failure was due to the negligence of the company and its agents; that Augusta had complied with all of the requirements of the company, and for the reason stated the alleged damages to the plaintiff followed.

"The appellant answered admitting the application for insurance, the medical examination, the issuance of the policy, and that it was mailed to the company's agent at Greenville. It alleged that any delay in the medical examination was waived. It set up the terms of the application and policy wherein the policy was to be of force only after delivery, and only then when delivered to the assured while she was in good health and the premium paid; that the premium has not been paid nor the policy ever delivered for the reason that the assured was sick when delivery was sought to be made, and which was undertaken within a reasonable time; that the alleged cause of action did not survive to the plaintiffs in their individual capacity, no administration of the estate having been had, and the plaintiffs being only a part of the real representatives of the deceased.

"Upon these issues the case went to trial at the Greenville November, 1922, term of the Court of Common Pleas, before Presiding Judge Thos. S. Sease and a jury. At the close of the testimony the appellant moved for a nonsuit or directed verdict on the issue of punitive damages and for a nonsuit on the whole case, upon the grounds appearing further on in the case. The motion as to punitive damages was granted, but overruled as to the whole case. The jury returned a verdict for the plaintiff for $1000.00, the face of the policy, with interest from July 6, 1921, the date the action was begun. From the judgment entered or to be entered, due notice of intention to appeal was served."

"The exceptions are ten in number, and we will not consider them all, as it is unnecessary in the view that we entertain that the judgment must be reversed and complaint dismissed, as both the application and the policy contained this agreement:

" 'This policy shall not take effect until the first premium is paid and the policy delivered, nor unless on the date of said payment and delivery of the policy, the insured is alive and in sound health.' "

"The premium was never paid, the policy was never delivered, and the insured died. The case of Going vs. Mutual Benefit Life Ins. Co., 58 S. C. 211, 36 S. E. 556, had no such provision either in the application or the policy itself. Neither can this case come within the principles announced in Williams vs.

Philadelphia Ins. Co., 105 S. C. 305, 89 S. E. 675, so as to sustain the verdict."

"The appellant was entitled to a non-suit as asked for on the whole case, on the ground that the application and policy contained three conditions precedent; first, payment of the premium; second, delivery and acceptance of the policy; third, a state of good health at the time of delivery. Judgment reversed."

In the early case of *Alabama Gold Life Insurance Company vs. Mayes,* 61 Ala., page 163, the Court held:

"The fact is undisputed, that appellant did not accept, but rejected the application. It is however insisted that the rejection came too late—that the appellant was bound to accept or reject the application within a reasonable time, and if rejected, notify the deceased thereof, returning the money advanced by him, and his note. The delay of the appellant then would take the place of the assent which is the essential ingredient of the contract. We are not aware of any authority for the proposition, that mere delay, mere inaction, can amount to an acceptance of a proposal to enter into a contract. The opposite is a true doctrine that if no answer is given to the proposition for a contract, within a reasonable time, the proposition is regarded as withdrawn. The principle is stated in Hallock vs. Connecticut Ins. Co., 41 Conn. 268: 'A contract arises when an overt act is done, intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of a proposer or not, and unless a proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given at a reasonable time.'

"If the appellant was dilatory in acting on the proposal, the deceased could have quickened its diligence, by demanding prompt action; or, if not assenting to the delay, he could have retracted his proposal, and reclaimed the money he had advanced and his notes. He had no right, without an inquiry as to the cause, without any action on his part, to rely on the supineness of the appellant, no greater than his own, as an acceptance of the proposal. Insurance Co. vs. Johnson, 33 Penn. St. 72; Bentley vs. Columbia Ins. Co., 17 N. Y. 421; Flanders on Insurance, 108."

"It is also insisted that the rejection of the application was without cause, and that though the proposition was subject to the approval of the appellant, yet the necessary implication is that the approval would be given unless good cause existed for withholding it. There are authorities, holding, that if an agent is authorized to make contracts of insurance, and he makes a contract subject to the approval of the principal, that the principal cannot, without sufficient cause, withhold his approval. Flanders on Insurance, 10-7-8, citing Insurance Co. vs. Webster, 6 Wall. 192; Palm vs. Medina Ins. Co., 20 Ohio 529; Light-

boy vs. North American Ins. Co., 23 Wend. 18; Perkins vs. Washington Ins. Co., 4 Cowan 645. A marked and distinguishing feature between those cases and the present is, that there was no contract made by the agent, if he had authority to make any. The only power he exercised was that of receiving the application and premium, reserving to his principal the absolute, unqualified right of rejection, and distinctly stating the consequences of rejection, that the transaction between him and the deceased should be void. This reservation was vain, if the appellant could now be required to show cause for its rejection of the application. We adopt the language of the Supreme Court of the United States, in a similar case: 'It was clearly within the power of the company, under the conditions expressed, wholly to reject the application, without giving any reason; or to accept the proposition with such modifications of the terms specified, and of the usual conditions of such policies as it might see fit to prescribe. The entire subject was both affirmatively and negatively within its choice and discretion.' Insurance Co. vs. Young, 22 Wall. 83.

"In view of all the facts the jury should have been instructed, that the appellant had not entered into any contract of insurance, or any agreement to insure life of deceased; that the transaction, until the proposal of deceased was rejected, was merely preparatory to, or initiatory of a contract, and was terminated absolutely by the rejection of the appellant of the proposal, imposing no duty or obligation on the appellant, other, than on demand, to return the money paid to its agent, and the note of deceased. Real Estate Ins. Co. vs. Roessle, 1 Gray 336."

I respectfully submit that the above authorities are conclusive of the proposition of law advanced by me and that, under the common law, there can be no liability for mere delay in passing upon an application for insurance, nor can a cause of action for mere negligence be grounded upon any such delay.

Turning now to the decisions of some of the states of the Union holding life insurance companies liable in actions of tort for so called negligent delay in and about the receiving, execution and delivery of life insurance policies, I submit that each and every one of them is pure judicial legislation, utterly illogical and unsound and illustrative of the truth laid down in the parody appearing at the beginning of this paper. One court went wrong, and others apparently followed in its path without any logical reason for so doing.

In the case of *Boyer vs. State Farmers, etc., Hail Ins. Co.,* 121 Pac. 329 (Kansas), decided in 1912, this alleged principle of law had its birth.

It is not remarkable that, in the opinion of the court, not a single authority was cited to sustain this revolutionary doctrine, because in truth and in fact, so far as we can find, no such authority existed.

It is the more probable that this error was fallen into because the Supreme Court of the State of Kansas had, contrary to the overwhelming weight of authority elsewhere, held that mere delay in acting upon an application for insurance might cause the presumption of the acceptance of the same. See *Rickett vs. German, etc.,* 39 Kan. 697, 18 Pac. 903, and *Preferred, etc. vs. Stone,* 61 Kan. 45, 58 Pac. 896.

The following year, 1913, the Supreme Court of *Iowa* decided the case of *Duffy vs. Bankers Life Association of Des Moines,* 139 N. W. 1087, basing its decision upon the Boyer case, supra, and, in endeavoring to justify such a revolutionary holding, referred to the fact that the insurance company held and was acting under a franchise from the State. By franchise, we suppose the court meant a charter of incorporation, for the purpose of doing an insurance business.

How utterly untenable this theory is upon such a ground is made manifest when we remember that likewise, Banks, and Building and Loan Associations have charters or franchises and are governed by regulations of the State as passed by its legislative body.

Suppose an application should be made to a bank for a loan of $20,000.00 and the bank should take the matter under consideration and make no reply either accepting or rejecting the application for one day, one week, one month, or one year. I submit that there is not an authority in the world that would hold the bank liable for any damages sustained by the applicant by reason of any so called negligent delay in passing upon the application. There is neither legislative right nor common law right in any applicant to compel loans to be made by banks to applicants who are either wealthy or impecunious, and for delay in acting upon an application certainly no bank would be liable whether such delay is negligent, intentional or otherwise.

And yet, such utterly unsound reasoning, together with the citation of the Boyer case, supra, from Kansas, is the sole support for such a holding.

So, on these two cases, which were under hard circumstances, this erroneous precedent and unsound theory had its beginning.

The Supreme Court of *Iowa* again in 1918, where the applicant had paid the premium in advance for a fire insurance policy, still held to the proposition that the horse was sixteen feet and not sixteen hands high, referring to the previous case of *Boyer vs. Ins. Co., supra,* and the Duffy case, supra.

In the subsequent case of *Evans vs. International Life, etc.,* 252 Pac. 266, the Supreme Court of *Kansas,* while apparently adhering to the fallacious proposition of law of negligent delay, held further that on an application made July 31, 1922, and on which no policy had been delivered up to August 15, 1922, when the applicant died, was guilty of no negligence which was actionable and it held further, "and it was not negligence of the insurance company to refuse to issue the policy of insurance applied for until it could, within a reasonable time, obtain a satisfactory explanation from its medical examiner concerning the disease mentioned." And in the concluding paragraph of the opinion the court said, "There was no completed contract, no meeting of the minds, no delivery of the policy and no negligence of the company in seeking further information."

It appears that this doctrine spread from Iowa and Kansas then to the neighboring State of *Nebraska,* and in the case of *Wilken vs. Capital Fire, etc.,* 157 N. W. 1021, that Court, in 1916, held that the delay in forwarding an application for a fire insurance policy by a sub-agent of the company was actionable. In this case likewise, the premium on the proposed policy had been paid in advance and the court held that, under those circumstances, it was for the jury to say whether the delay was negligent.

The next time the Supreme Court of *Nebraska,* however, passed upon this proposition, in 1919, was in the case styled *Meyer vs. Central States Life Insurance Co.,* 173 N. W. 578, and in the principal opinion of the court, where it discussed what constituted negligent delay, concluded its opinion with these words: "Without regard to the insufficiency of the evidence to sustain the judgment, it is the opinion of the writer that no cause of action exists in favor of plaintiff and against defendant. Reversed and dismissed." And Mr. Justice Cornish in a concurring opinion makes it plain that he does not think the discus-

sion of whether there was sufficient evidence of negligence or not had any bearing on the case. Amplifying the above quoted concluding paragraph of the opinion of the Court he says: "In the absence of contract, the defendant owed the deceased no duty to furnish him insurance and failure to furnish him insurance would not be the basis for an action in tort."

So it appears that, while not expressly, but by necessary implication, the Meyer case overrules the previous Wilken case above quoted from.

In the still later case in Nebraska of *Handlier vs. Knights of Columbus,* 183 N. W. 300, decided in 1921, the Supreme Court of that State held that non-action of an insurance company on an application created no liability, "although the application was prevented from reaching said office by the negligence of a subordinate lodge officer, whose duty it was to transmit it." It also calls attention to the fact that in the Wilken case cited, supra, three of the justices dissented from the holding of the court and cited with apparent approval another case in the following language, to-wit: "In *National Union Fire Ins. Co. vs. School District,* 122 Ark. 179, 182 S. W. 547, it was held that the insurance company was not liable for failure of its soliciting agent to forward the application, either upon the theory that a contract had been consummated or upon a theory in an action in tort."

The next time this question came before the Supreme Court of Nebraska was in 1922, in a fire insurance case styled *Paige vs. National Automobile Ins. Co.,* 190 N. W. 213, the syllabus in which case holds as follows, to-wit:

"Evidence held insufficient to sustain a judgment in favor of plaintiff in an action to recover from a fire insurance company damages for failure to act within a reasonable time on an application for insurance."

In this case the premium was paid in advance. The court in its opinion states that the plaintiff's view of the law on which it asks a recovery was on the question of negligence under the case of *Wilken vs. Capital Fire Ins. Co.,* 157 N. W. 1021. The court seems to dodge the question of which of the preceding decisions were or declared the law by holding as follows:

"Assuming that the law is as stated by plaintiff and that the facts pleaded in his petition are sufficient to constitute a cause of action, but not now passing on either of those questions, the review of the record may be narrowed to a single assignment of error in the insufficiency of evidence to sustain

the judgment. Was the defendant guilty of actionable negligence?''

The court reviewed the facts and held, independent of whether there was such a principle of law of recovery in tort for negligent delay, that in case at bar there was not sufficient evidence of negligent delay to submit the case to the jury and the judgment for the plaintiff was thereupon reversed and final judgment entered in favor of the defendant.

What is the law in Nebraska on this subject? Frankly, I do not know whether Nebraska now sustains or rejects this new-fangled theory of actionable tort. Certainly it is limited to those cases where the premium is paid in advance.

In the case of *Northwestern Mutual Life vs. Neafus,* 140 S. W. 1026, decided in 1911, appears some obiter dicta which is sometimes referred to as being the foundation of the above mentioned unsound theory of tort. A careful examination of that case shows clearly that if any such construction can be placed upon the opinion it was clearly obiter dicta. The official syllabus shows that it holds as follows:

''A receipt, issued by a life insurance agent to an applicant for insurance, reciting that an application for a policy has been made, that the first annual premium has been collected, if the application is approved and in that event the insurance will be in force from the date of the medical examination, does not create a contract of insurance from the date of the examination until the application for insurance has been acted upon by the insurer, especially where the applicant is not a desirable risk.''

''Where an application for life insurance, subject to approval by insurer, is made, and the soliciting agent gives a receipt, acknowledging that an application has been made, that the first anual premium on the policy has been paid, provided the application is approved, mere delay in acting on the application which, if acted on, would be rejected, does not fix liability on insurer from the date of the application.''

In the case of *Deford vs. New York Life,* 224 Pac. (Colo.) 1049, the Court in its opinion holds as follows, to-wit:

''Cases are cited to the effect that an insurance company is not required to insure all applicants who may be eligible to insurance, and that it is not under duty to act promptly in considering applications. This case, however, presents a different question. When a company has received the first premium and it is to apply from the date of the application, fair dealing requires that the company act upon the application, within a

reasonable time. Otherwise, it would be permitted to hold the applicant's money with no return, for such time as it saw fit; a condition which cannot be supposed to have been intended by the parties."

The State of *Oklahoma* seems also to have adopted, in a measure, this fallacious doctrine of tort. In the case of *Security Ins. Co. vs. Cameron,* 205 Pac. 151, the court dealt with a case where the premium had been paid in advance to the local agent, who neglected to send in the application promptly. The court in that case referred to the case of *Boyer vs. State Farmers, etc.,* 121 Pac. 329, and also the Duffy case, 139 N. W. 1087, and the Johnson case, 168 N. W. 264. The court also in that case seems to lay stress on the proposition that because the defendant was a corporation and had a franchise from the state that, therefore, it could be mulched in damages where an individual, under similar circumstances, would plainly have no liability.

Again, the Supreme Court of *Oklahoma* in the case of *Columbian National Life vs. Lemmons,* 222 Pac. 255, held to the tort theory where a premium had been paid in advance at the taking of the application and furthermore on approval of the application the insurance policy was to date back to the date of the payment of the premium.

Oklahoma again, in the case of *Childers vs. New York Life,* 245 Pac. 59, holds to the actionable tort theory in a case in which the premium on the policy had been paid in advance. This policy was issued as applied for on March 13, 1923, and was mailed to the local agent in Oklahoma and reached him on March 19, 1923, and the applicant was accidentally killed March 16, 1923. The court held that the jury should pass on the question of the alleged negligence in delay in delivering the policy.

In some cases, the facts were made to appear that the agent, when he took the application for the policy, stated in effect, that the policy would go into effect as soon as the medical examination was taken and in some instances the court held, under those circumstances that the insurer must accept the risk or decline it within a reasonable time. These authorities are in the face of the overwhelming weight of authority that a local soliciting life insurance agent whose authority is limited to merely take applications and to submit them for decision to the company cannot bind the company or make a contract. Such a case is that of *Dyer vs. Missouri State,* 232 Pac. 346, as is also

Great Southern Life vs. Dolan, 239 S. W. 236. In each of these cases, last cited, the premium was paid in advance and representations were made by the local agent that the policy would be in force immediately on the examination.

In the case of *Wanberg vs. National Union Fire Ins. Co.,* 179 N. W. 666, the North Dakota statute with reference to applications for hail insurance became written into policies within twenty-four hours of the application under certain conditions and was enforced by the Supreme Court of North Dakota. One member of the Court dissenting held the statute to be void under the Fourteenth Amendment to the Constitution of the United States. In the dissenting opinion Mr. Justice Roberson held, "If the statute be so construed as to deny the validity of such a contract (as to when it should take effect) and to impose on defendant a contractual obligation to pay $1500.00 when it made no such contract, then the statute does impair the obligation of contracts and it deprives the defendant of its property without due process of law." This was appealed to the Supreme Court of the United States and there affirmed as to its constitutionality in 260 United States, p. 71; 67 Law Ed., p. 136. The Supreme Court of the United States declared that the statute went to the extreme limit of the legislative power of the state under its police powers, but still that being such a police regulation passed by the legislature of the state, it did not violate the Fourteenth Amendment to the Constitution of the United States.

I respectfully submit, however, that no court has legislative power. That has been delegated solely to the legislative department of the government. The legislatures of the various states have prescribed in extenso rules and regulations and stipulations and provisions governing contracts of life insurance entered into in such states, but nowhere is there a hint of any legislative action making delay in acting upon an application for insurance a legal wrong and an actionable tort and in the absence of such legislative action the courts have no power so to legislate.

I submit that each and every decision, beginning in 1912 with the case of *Boyer vs. State Farmers Ins. Co.,* 121 Pac. 329, and closely followed by *Duffy vs. Bankers Life,* 139 N. W. 1087, decided in 1912, in which there was no statute passed by the legislative branch of the government under its police powers making negligent delay ac-

tionable, is the grossest form of judicial legislation, and that each is utterly unsound and illogical.

The calf ambled and made a devious path through the forest in 1912, but the Supreme Court of Mississippi, in the case of *Savage, Administrator, vs. Prudential Insurance Company,* 121 So. 487, declined to follow such devious wandering of that calf through the woods.

Disregarding the fetish of precedent established in many of the states of the Union, hereinbefore referred to, our court, speaking through Mr. Justice McGowen, repudiated any such holding of liability, and in the most logical and best reasoned decision, in my opinion, which anywhere appears in the books, upon the subject, forever set at rest any attempt to establish such doctrine in this State. Furthermore, this decision is bound to be widely cited and to have a tremendous influence in similar cases in the courts of other states. Its conclusions are so logical as to be unanswerable. It is like unto a house builded upon a rock. It will and should stand all tests.

Upon substantially the reasoning hereinabove set forth it holds that life insurance companies are under no legal duty to act promptly or at all upon applications made to them and hence there can be no liability for failure to act promptly thereon.

PRIVILEGE: ITS PAST AND PRESENT CONTENT

By Lewis C. Cassidy*

"It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."—Mr. Justice Holmes in Hyde vs. United States, 225 U. S. 391 (1911).

The methodological study of jurisprudence from the sociological standpoint involves a consideration of law functionally with respect to social ends to be accommodated. Anglo-American scholars are under a great debt to Dean Pound for pointing out the way and molding the opinion of the bench and bar in this direction by a long series of contributions[1] to the subject in which he is so deeply versed. But the sociological method does not purport to be at complete variance with the analytical, historical and philosophical schools, for a learned author has recently said:[2] ". . . whatever may be said of the respective merits of the various schools of jurisprudence, we are unquestionably indebted more to analytical jurisprudence . . . for giving order and classification to law through juristic conceptions which explain the law that is."

In the classical Roman law *privilegium* was used to indicate a law enacted for or against a single person, a meaning apparent from the etymology of the term. When Justinian conferred upon soldiers the right to make a testament without the usual formalities, the word was used to embrace a special class of persons upon whom rights were invested. This latter meaning was absorbed by the canon law, for Isidore of Seville[3] noted that: "Privilegia

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1 Pound, Interpretations of Legal History, Cambridge (Eng.) Studies in Legal History, 1923; Pound, The Spirit of the Common Law, 1921; Pound, An Introduction to the Philosophy of Law; Pound, Law and Morals, 1924.

2 De Sloovere, Analytical Jurisprudence as Related to Modern Legal Methods, 7 New York University Law Quarterly Review, 116 (1929).

3 Decretals, i, 3, 3. There is ample material for a treatise dealing with the canon law in relation to common law. It would deal with the modern doctrine of consideration, equity and equity procedure, vicarious responsibility and probate law. Professor Langdell and Professor Maitland left interesting parallels.

sunt leges privatorum quasi privatae leges. Nam privilegium inde dictum est, quod in privato feratur." When in 1918 the revised canon law became effective, canon 63 defined a privilege as "A private law conceding a favor which dispenses the privileged person from obedience to some law, or gives him powers beyond those fixed by the ordinary provisions of law. Canon 74 declared their extinction with the death of the holder, just as at common law, before Lord Campbell's act, the right of maintaining an action died with the person. A third meaning of privilege gradually evolved when it was regarded as a common right, the sense in which it is used today quite generally. In the thirteenth century the instrument granting the privilege was regarded as the privilege.[4] The charter of the East India Company was referred to as a privilege, and Blackstone[5] used the term to signify the rights of a class of persons or of a corporation. Professor Austin, the founder of the English analytical school, used the word in the same sense. The right of the law merchant which was brought into the common law in the eighteenth century was described as "a privilege or special law differing from the common law."[6]

The following schema of Dean Pound[7] will indicate the variety and extent of the current use of the term privilege in current law:

"Privilege recognized by law immediately:

Self-defense.

Self-help.

Self-redress.

Prevention of felony.

Arrest for felony, affray, etc.

Privileges as to speech and writing:

In legal proceedings.

In administrative matters.

In legislative assemblies.

Reports of public meetings.

Comment on and criticism of public affairs, public officers and candidates.[8]

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4 Miller, The Data of Jurisprudence, 103-108.

5 Bk. 1, 272.

6 Report of 19th Conference of International Law Association, 42. Compare the influence of Lord Mansfield in this connection in the 18th century.

7 Pound, Outlines of Lectures on Jurisprudence, 4th ed., 97-98.

8 Odgers, Libel and Slander, 241.

Privilege based directly on justification:
Prevention of or defense against public peril—fire, flood, disease.
Defense against the public enemy.
Deviation where highway is impassable.
Privilege arising from legal transactions:
License.
Estate without impeachment of waste."

To the foregoing list should be added the privileges and immunities clause of the Federal Constitution,[9] the privileges of members of Congress and the privileges of ambassadors and other diplomatic agents. The sense in which the word is used in these connections, as when persons are acting in the public interest are said to be privileged when ordinary citizens in similar circumstances would be liable, as for libel or slander, is not to defame, but to act without fear of consequences to others.[10]

In 1913 the late Professor Hofeld published an article regarding "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,"[11] a widely read critique which has not met with sustained approval during the last decade. Viewing fundamental legal relations under the category of jural opposites, Professor Hofeld contrasted privilege and duty. Jural correlatives considered, privilege was made antithetical to no-right. As an example of jural opposite, the following was given as an example: "If A has not contracted with B to perform certain work for the latter, A's privilege of not doing so is the very negation of a duty of doing so." This thesis quite readily will be admitted. Viewing jural correlatives, the author placed himself in opposition to the impression "that all legal relations can be comprehended under the conceptions 'right' and 'duty.'" To establish his theory, the language used by Professor Gray in section 48 of his volume, "Nature and Sources of Law,"[12] was taken as a criterion: "The eating of a kind of salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat salad for which I have paid, although I know it will

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9 Article XIV.
10 Bell, Prin. 2045, quoted by Miller, supra.
11 23 Yale Law Journal, 16; 26 ibid. 710.
12 First edition. There are two editions, the second of which was edited by the author's son, Mr. Roland Gray.

make me ill." Professor Hofeld's critique, not always pellucid, is as follows: "This passage seems to suggest primarily two classes of relations: first, the party's respective privileges, as against A, B, C, and D and others in relation to eating the salad, or, correlatively, the respective no-rights of A, B, C, D and others that the party should not eat the salad; second, the party's respective rights (or claims) as against A, B, C, D and others that they should not interfere with the physical act of eating the salad, or, correlatively, the respective duties of A, B, C, D and others that they should not interfere."

"These two groups of relations seem perfectly distinct; and the privileges could, in a given case, exist even though the rights mentioned did not. A, B, C and D, being the owners of the salad, might say to X: 'Eat the salad if you can; you have our license to do so, but we don't agree not to interfere with you.' In such a case the privileges exist, so that if X succeeds in eating the salad he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding fast to the dish that X could not eat the contents, no right of X would have been violated."

Again, in Professor Hofeld's criticism[13] of the language used by Lord Lindley in the case of *Quinn vs. Leathem*,[14] the point of view is made more apparent, for truly a dish of salad has seldom before been the subject of such learned analysis. Lord Lindley said, inter alia: "The plaintiff had the ordinary *rights* of the British subject. He was *at liberty* to earn his living in his own way, provided he did not violate some special law prohibiting him from doing so, and provided he did not infringe the right of other people. This *liberty* involved the liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so." "A *liberty* considered as a legal relation (or right in the loose and generic sense of that term) must mean, if it have any content at all," says Professor Hofeld in referring to the

13 Page 42.
14 [1901] A. C. 495, 534.

use of that term by Lord Lindley, "precisely the same thing as privilege, and certainly that is the fair connotation of the term as used the first three times in the passage quoted." Professor Hofeld said that the "dominant technical meaning of the term is negation of duty." The colloquial expression "This is your privilege" means: "You are under no duty to do otherwise."

The "right" of Professor Gray, as well as the "liberty" of Lord Lindley's paragraph, more properly called a "privilege" by Professor Hofeld, come within the scope of jural correlatives "privilege" and "no-right." Admittedly, Professor Gray and Lord Lindley used inept language in the paragraphs analyzed by Professor Hofeld. Conceding, too, the service which has been rendered legal science by the classifications of Professor Hofeld, a schema, however, which has not as a whole fully commended itself to eminent present-day jurists, there is yet another approach to the paragraphs under criticism. This is to view the "privileges" simply as *colorless* acts, acts as to which the law is indifferent since they are void of juristic consequences, and, therefore, there can be no just complaint if such acts be termed "privileges," and it be remembered that they are not the proper subject of legal classification. And it will not be unforgivable if one relapse, like Professor Gray, and speak of a "right" to eat a certain type of salad rather than the preferable term "privilege."[15]

The editors of two recent collections of cases on the law of torts have divided on the use of "privilege" as a term to include types of cases treated heretofore under the headings "Justification and Excuse." Professor Bohlen[16] has subdivided Topic VIII, called "Invasion of Interests of Economic Advantage and Opportunity," into four chapters, the last two of which are Chapter III, "Privilege to Intentionally Invade Interests of Economic Advantage and Opportunity to Advance or Perfect the Actor's Conflicting Economic Interests," and Chapter IV, "Privilege to Invade Another's Interest . . . Without Corresponding Benefits to Like Interests of the Actor." Professor Wilson,[17] on the other hand, treats the same subject mat-

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15 Page 42.
16 Bohlen, Incomplete Privilege, 39 Harvard Law Review, 307.
17 Wilson, Cases on the Law of Torts, x, 1928.

ter differently. In Part V, "Specific Harms Produced Through Intangible Media or to Intangible Things," under L, "Justification by Competition and the Like (The Adjustment of Economic Claims)." Professor Bohlen's use of the term "privilege" is being used now more frequently, and while the standard texts on the law of torts[18] have not yet made use of the term in that connection, confining it mainly to the law of defamation, absolute and qualified privilege, Professor Beale will use the term in the later sense in future publications.[19]

II.

Considering now cases[20] from the standpoint of justification and excuse and rights by necessity, both of which categories may be treated as branches of the law of privilege, it will be recalled that with reference to justification and excuse the effect is the same although the distinction was important at common law; a right of way, the due execution of a criminal, being example of justification, whereas self-defense is a matter of excuse. Bouvier[21] notes that "Justification admits doing of the act charged, but alleges a right to do it on the part of the defendant, thus denying it is wrong. Excuse merely shows reasons why the defendant should not make good the injury which the plaintiff has suffered from some wrong done."

Since the interests here are well defined and in juxtaposition, the starting point may well originate with Dean Pound's postulate anent interests, lately revised in form rather than in substance:[22] "An interest for the present purpose is a claim or want or desire of a human being or group of human beings which . . . (they) seek to justify, and of which, therefore, the ordering of human relations must take account. "The first step is to take a census. . . . The next is to generalize them. . . . We have then to weigh or value them so as to determine whether and how far to recognize them and give them effect through the law. . . . A legal system attains its

18 Pollock, Beven, Salmond, Bigelow and Cooley.

19 For example, Conflict of Laws.

20 There is, in the main, only infrequent criticism of the inclusion of most of the other sub-titled under Dean Pound's outline of privilege.

21 Bouvier, Baldwin ed., p. 637.

22 Select Essays on the Law of Torts; Pound, Interests of Personality.

end by recognizing certain interests." In addition, Professor Bohlen[23] very pointedly remarks: "There is nothing better settled than that an act which has certain legal effects may have very different effects if done for some particular purpose." Rather than speak of intrusions which are justified, he speaks of "privileged intrusions on real property," contending rightly that whether the intrusion be to realty or personalty should make no difference. The purpose of his article appears from his own language as "A distinct limitation of *Vincent vs. Lake Erie Transportation Company,*[24] which will be considered further on."

In speaking of the application of the doctrine of necessity, the late Sir John Salmond said:[25] "In some cases even damage intentionally done may not involve the defendant in liability where he is acting under necessity to prevent a greater evil. There is not a great deal of authority on this branch of the law." The earliest authority is found in Year Book 21 Hen. VII[26] confirmed by the decision in *Maleverer vs. Spinke.*[27] In the former decision, Justice Kingmill held that acts necessary for the common weal were justifiable, referring to examples to illustrate his point: taking goods out of a house to save them from fire; the pulling down of a house to prevent the spread of fire to other houses; and, in time of war, to enter another man's land to make a bulwark in defense of the king and the realm. But cases also appear in which the same doctrine has application where one is protecting his own rights, as in *Cope vs. Sharpe,*[28] where the burning of another's heather to prevent the spread of a heath fire to a place where the defendant's pheasants were kept was held to be justified, the test of reasonable necessity being the condition of affairs at the moment the act in question took place.

The right of a passenger to go on adjoining land if the highway be foundrous is traceable to Henn's case,[29] but there is only a dictum of Chief Justice Tindal[30] that dam-

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23 Page 308.
24 109 Minn. 456. (1910).
25 8th ed. by Stallybrass, 1928.
26 Fol. 27, pl. 5. (1507).
27 Dyer, 36b. (1538).
28 [1912] 1 King's Bench, 496.
29 Sir W. Jones, 296. (1633).
30 Anthony vs. Haney, 8 Bing. 193. (1832).

age done should be compensated. . . . "at any rate the owner might enter and take his property subject to the payment of any damage he might commit."[31] This dictum received approbation in the Vincent case, supra, to which Professor Bohlen has taken exception. In Mouse's case,[32] the defendant was sued for taking and carrying away the plaintiff's casket, it appearing that the defendant, a ferryman, took forty-seven passengers from Gravesend to London. A tempest arose which endangered the lives of the passengers, whereupon the plaintiff's goods were cast from the barge with the goods of other passengers. The court held that the tempest being an act of God, everyone ought to bear his loss to safeguard the lives of all. So in *Asser vs. Finch,*[33] which was an action in trespass for entering a close and spoiling the grass, which, the defendant justifying, the plaintiff replied *extra viam,* upon which issue was joined and verdict obtained by the plaintiff. In *Absor vs. French,*[34] the defendant pleaded that there was a highway, that the plaintiff stopped it so that he could not pass, whereupon the defendant went over the plaintiff's close, doing as little harm as possible. Upon demurrer the plea was held to be good, for "if the way be so foul as is not passable, I may then justify the going over another man's close next adjoining."[35]

The strictness of the pleading at common law is apparent in *Gilbert vs. Stone,*[36] and the language of the reporter should not be paraphrased: "In trespass for breaking of a house and close, the defendant pleaded that 12 homines ignoti modo guerrino armati tantum minabantur ei quod de vitae suae amissione dubitabat, and after that requirebant and conpulsabant, the defendant to go with them to the house, quodque ob timorem minarum and per mandatum and comulsionem dictorum 12 hominum, he did enter the said house and returned immediately through the said close which is the same trespass, etc. And upon demurrer, without argument, it was adjudged no plea, for one cannot justifie a trespass upon another for fear, and the defendant hath remedy against those that compelled him. Also the manner of the pleading was naught, because he

31 Adopted by the Vincent case.
32 12 Coke, 63.
33 30 Car. 11, 11. Levinz' edition. (1793).
34 30 Car. 11. Leach edition, 366. (1874).
35 1 Hawkins Pleas of the Crown, ch. 76, sec. 2.
36 Trinity, 17 Car. Rot. 1703. Reprinted by John Aleyn. (1688).

did not show that the way to the house was through the close." If the case be made to turn upon the last element mentioned, it may be upheld; but if the force, subjectively considered, made the defendant's act involuntary, then it can not be upheld, and, therefore, the companion case of *Smith vs. Stone*[37] should be considered. There the defendant was carried by force upon the plaintiff's land. In disposing of the demurrer, Justice Roll said: "It is the trespass of the party that carreyd the defendant upon the land, and not the trespass of the defendant, as he that drives my cattel into another mans land is the trespassor, against him and not I who am owner of the cattel."[38]

The well considered opinion of the court in *Cunningham vs. Pitzer*[39] reviewed the earlier authorities and reached the same conclusion as Justice Roll did in *Smith vs. Stone.* There the defense was of duress, the defendant being in the Confederate service and claiming that he took two hundred bushels of wheat under reasonable apprehension of serious bodily harm in the event of refusal. The court upheld the defendant's contention saying, inter alia: "There is to be observed a difference between the times of war or public insurrection or rebellion and the times of peace." This added element merely reinforces the defendant's contention in the case at bar. The decision is valuable for the thoroughness with which the court considered the ancient authorities.

Two American cases have drawn the fire of students not in harmony regarding their probable consequences. In *Ploof vs. Putnam,*[40] the plaintiff, his wife and two children were in a sloop on Lake Champlain when a violent storm arose. He moored his sloop to the defendant's dock during the storm, but the defendant's servant "wilfully and designedly unmoored the sloop, whereupon, without the plaintiff's fault, the plaintiff and his family were thrown into the lake and the sloop and its contents destroyed." The defendant's demurrer was overruled. Upon appeal, judgment for the plaintiff was sustained, the court taking occasion to state that "the doctrine of

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37 23 Car. Banc. Reg. Reports of William Style. (1658). The reporter noted that that "part of the Common Law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others than to defend themselves. . . ."

38 Referred to by Dean Pound, as was the Gilbert case.

39 2 W. Va. 264. (1867).

40 81 Vermont 471. (1908).

necessity applies with special force to the preservation of human life," and that the plaintiff's entry was "justified by necessity." Reviewing the earlier authorities the court noted "many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would have otherwise been trespasses." If the sloop had not been unmoored, but had damaged the wharf of the defendant in the preceding case, would there have been a cause of action to recover for the damage done? The case of *Vincent vs. Lake Erie Transportation Company* is authority for the allowance of a recovery, as the facts in the latter case were of the kind just suggested. Professor Bohlen's dissent to such a doctrine has been referred to as well as the dictum of Chief Justice Tindal in favor of a recovery. Professor Joseph H. Beale has orally criticized the Ploof case as not being a case of necessity at all, making the point that the plaintiff and his family could have come on the wharf when the sloop was first moored, or that unmoored, the sloop might have been beached, to him more preferable than the possible pounding away of the wharf. In the Vincent case a recovery was allowed for the damage done to the wharf in just such a case. Weighing the social interests involved, one can not agree with Professor Beale's contention regarding the Ploof case, and, considering and evaluating the same social interests in the Vincent case, one will hesitate very long before stating that substantial justice was not accomplished by that decision, with which the Ploof case is not in conflict. The test can not be that the Ploof case is wrong because the plaintiff should have taken himself and family from the wharf when first moored, for to do so would mean the exposure of his family to the elements and the possibility of the casting off of the sloop by defendant's employee. As Von Jhering reminds us, the strong trend in the recent philosophical schools points to the high value of personality and the lower value of property, in sharp distinction to the tenets of the historical and analytical schools of the nineteenth century. In America the sociological school under the leadership of Dean Pound has recognized the turn in the tide of public opinion and conduct and has helped to mold it towards social ends, the interests of society as a whole, and there is ef-

ficacy in the effort made by men of action and purpose to consider the group as well as the individual.

There is merit, too, in the wide classification of privilege by Dean Pound, and to it, in addition to the omissions noted, should be added the privilege afforded by the doctrines of necessity, of justification and excuse.

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NOTE AND COMMENT

FIVE TO FOUR DECISIONS OF THE UNITED STATES SUPREME COURT.—Decisions of the United States Supreme Court have very often had a dissenting opinion, especially on questions involving the construction of our Constitution. Simply as a matter of historical interest let us consider the first two decisions in which there were minority opinions. These were the cases of *Georgia vs. Brailsford*, 2 Dallas 415, decided in 1792, and *Ware vs. Hylton*, decided in 1796. They involved the principle that the Treaty of Peace made with Great Britain, like the Constitution, was the highest law of the land and could not be restricted by state action or state laws. John Marshall was one of the attorneys who by brilliant reasoning did his best to convince the court that Congress had no power to make a treaty that would annul a legislative act of a state, and thus destroy rights acquired under such an act. Justice Iredell alone was persuaded by his argument.[1]

We find, however, that decisions of the Supreme Court decided by the vote of one man have almost entirely occurred since the Civil War. Probably this could be explained as due to the dominating personalities and abilities of the Chief Justices. Fewer constitutional questions arose in that period, also. Marshall was Chief Justice from 1801 to 1835, and during those years but sixty-two decisions were given upon constitutional questions.[2] Immediately after the Civil War, the President pardoned one Garland for his acts in aiding the South. Congress had passed acts which prevented such a man from practicing law in the Federal Courts. The Supreme Court by a five to four decision held the act unconstitutional.[3]

The Legal Tender cases in which Chief Justice Chase, who had been Secretary of the Treasury when the acts were passed, declared the acts to be null and void. Three judges alone dissented from this opinion. The personnel of the Court changed, Grant appointing two men whose views holding the legal tender features of Acts of Congress constitutional were well known.[4] The Attorney-General made a motion that the legal tender question be reconsidered. As a result, the case of *Hepburn vs. Griswold* was distinctly overruled.[5]

Very important decisions were rendered in the Slaughter House Cases, 16 Wallace 36, involving the construction of the Thirteenth, Fourteenth, and Fifteenth Amendments. The minority judges, Chase, Field, Bradley, and Swayne, held that it was intended by these amendments to secure the citizens against wrong and oppression by the state and that the majority decision had stricken down and defeated the will of the nation. In this case the majority held that these amendments had been passed for the purpose of

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1 3 Dallas 199, *Ware vs. Hylton.*
2 American Law Review, Five to Four Decisions; V. 54, p. 422.
3 4 Wallace 333, Ex parte Garland.
4 American Law Review, *op. cit.*, Vol. 54, p. 417.
5 12 Wallace 457, *Knox vs. Lee.*

protecting the negro and a broad construction was not intended to be given them, that they should be interpreted in the light of their history.

One of the longest cases that has ever been argued before the Supreme Court was the case of *Pollock vs. Farmers Loan and Trust Company.* Lawyers appeared before the Court for five days arguing the case. One-half of the 225 pages devoted to the case is taken up with the arguments of counsel. The Court decided that the Act of Congress of April 27, 1894, commonly known as the Income Tax Law, in certain of its provisions was unconstitutional and therefore void.[6] This decision was rendered by an evenly divided Court, 4-4. An income tax law had been passed by Congress shortly after the beginning of the Civil War, and it continued in force until it expired by its own terms in 1871. Neither side was satisfied with this holding, and both asked for a rehearing.[7] The case was re-argued and reported in 158 U. S., page 601. It was decided by a complete Court, Justice Jackson taking part in this decision. In this decision we find five judges holding the law null and void, while Justices White, Harlan, Brown, and Jackson rendered dissenting opinions. Mr. Maynard says that this case marked the beginning of the ever increasing belief that a majority of one should not have the power to declare Acts of Congress unconstitutional.[8]

In recent years many of the decisions of the Supreme Court rendered by a five to four decision which have aroused storms of protest are cases dealing with what has been termed "legalized sociology." Justice Holmes in dissenting opinion said that the states had the right, if they so desired, to attempt sociological experiments.[9] One of the first of this type of case was a New York case. The Legislature of that state passed a law providing that no employees shall be required or permitted to work in bakeries more than sixty hours in a week or ten hours in a day. Lochner was arrested for failing to obey this law. He was convicted and his case sustained by County Court, Supreme Court of New York, and the Court of Appeals. The United States Supreme Court set aside the verdict on the ground that the law was an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor and was in conflict with the Constitution.[10] Mr. Justice Holmes said, "I think the word *liberty* in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe upon fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health."

The State of Arizona passed a statute which gave the right to labor to picket peacefully the place of the former employer. The proprietor of the restaurant, English Kitchen, and his cook and waiters had a dispute which resulted in the cooks and waiters striking. They patrolled in front of the restaurant with banners and distributed handbills declaring the "unfairness"

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6 157 U. S. 429, *Pollock vs. Farmers Loan & Trust Company.*
7 American Law Review, *op. cit.*, Vol. 54, p. 500.
8 Ibid., Vol. 54, p. 500.
9 257 U. S. 312, *Truax vs. Corrigon.*
10 177 U. S. 145, *Lochner vs. New York.*

to union labor. The majority opinion held the Arizona statute unconstitutional as violating the Fourteenth Amendment, taking property without due process of law.[11] It would seem from this case that the minority opinion of the Slaughter House Cases had become in 1921 firmly entrenched as the opinion of the majority. The dissenting judges in the Truax case held the statute came under the police powers of the various states. They took cognizance of the changing attitudes toward labor, relating the history of the struggle of the workman in his fight for legal recognition.

The Supreme Court held in the Jensen case that where the workman who was drowned was under the jurisdiction of admiralty courts they could not apply Workman's Compensation Law.[12] In an attempt to remedy this situation Congress passed an act giving the admiralty court the right to apply Workman's Compensation Act of a state. A workman while employed on a boat fell into the Hudson River and was drowned. It was held that Congress had the right to pass a workman's compensation law, but that they did not have the power to delegate that right to a state.[13]

In 1916 Congress passed an Act which prohibited transportation in interstate commerce of goods made at a factory in which, within thirty days prior to their removal, children under the age of fourteen years had been employed, or children between fourteen and sixteen been permitted to work more than eight hours in any day or more than six days a week. The Supreme Court held the act to be unconstitutional. "It not only transcends the authority delegated to Congress over commerce, but it also exerts a power as to a purely local matter to which Federal authority does not extend." Justice Harlan, nevertheless, wrote an extremely vigorous dissenting opinion in which he asserted, "If an act is within the powers specifically conferred upon Congress, it seems to me it is not made any less constitutional because of the indirect effects that it may have." He cites the cases of tax on oleomargarine, tax on state banks, pure food and drug act was sustained with the intimation "no trade can be carried on between the states to which the power of Congress to regulate commerce does not extend." He closes his opinion, "The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe the fact would require a different decision from that reached in *Champion vs. Ames.* Yet in that case it would be said with quite as much force as in this that Congress was tending to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state."[14]

In case of *Black vs. Hirsh*[15] the Supreme Court held as constitutional a statute holding Congress had power to regulate the housing situation in the District of Columbia. A similar statute was declared to be constitutional when passed by New York Legislature.[16] These statutes were largely upheld

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11 257 U. S. 312, *Truax vs. Corrigon.*
12 244 U. S. 205, *So. Pacific Co. vs. Jensen.*
13 253 U. S. 149, *Knickerbocker Ins. Co. vs. Stewart.*
14 247 U. S. 277, *Hammer vs. Dagenbort.*
15 256 U. S. 136, *Black vs. Hirsh.*
16 256 U. S. 176, *Brown Holding Co. vs. Feldman.*

because they applied for only a limited time and were necessary to remedy a desperate situation.

Two cases dealing with "full faith and credit clause" of the Constitution have been decided by a majority of one. The well-known case of *Haddock vs. Haddock* held that under the famous clause New York is not obliged to recognize the validity of a divorce secured in Connecticut.[17] The other case was one coming from the Supreme Court of Mississippi. All the transactions dealing with gambling in cotton futures took place exclusively in Mississippi, between residents of Mississippi in violation of the laws of the state. Judgment was secured in Missouri, and the Mississippi courts refused to enforce it. It was held that the Missouri judgment was binding under the "full faith and credit clause."[18]

The Newberry case was another outstanding five to four decision. Newberry was the Republican candidate for the Senate from Michigan. Congress had passed an act which, taken with the state act, prevented more than $3750 from being spent on a senatorial campaign. Newberry was convicted of spending $100,000, and he appealed. The question was whether under power to regulate "manner of holding elections" Congress might fix the maximum sum which a candidate might spend. The majority held Congress had no control over party primaries for the election of senator, that it would be an interference with the purely domestic affairs of the states and infringe upon liberties reserved to the people.[19]

Other cases which have been decided by a five to four decision of the Supreme Court are:

Virginia Coupon Cases, 114 U. S. 269.
South Dakota vs. North Carolina, 192 U. S. 286.
Wheeler vs. New Brunswick Ry. Co., 115 U. S. 29.
The Great Western, 118 U. S. 520.
Hilton vs. Gray, 159 U. S. 113.
Saltonstall vs. Burtwell, 164 U. S. 54.
Adams Express Co. vs. Ohio, 165 U. S. 194.
United States vs. Freight Association, 166 U. S. 290.
Keels vs. U. S., 172 U. S. 434.
Atchinson T. Ry. Co. vs. Matthews, 174 U. S. 96.
The Pedro, 175 U. S. 354.
Freeport Water Co. vs. Freeport City, 180 U. S. 587.
Fairbanks vs. U. S., 181 U. S. 283.
Downes vs. Bidwell, 182 U. S. 244.
Wilson vs. Nelson, 183 U. S. 191.
Carnegie Steel Co. vs. Cambria Iron Co., 185 U. S. 403.
Lottery Case, 188 U. S. 321.
Northern Pacific Ry. Co. vs. Dixon, 104 U. S. 338.
Northern Securities Co. vs. U. S., 113 U. S. 197.
Sou. Iron National Bank vs. Dodge, 197 U. S. 70.
Keffel vs. Riffin Sou. Bank, 197 U. S. 356.
The Eliza Lines, 199 U. S. 119.
Continental Wall Paper Co. vs. Voight and Sons Co., 212 U. S. 227.
Hyde vs. U. S., 225 U. S. 347.
Slocum vs. N. Y. Life Ins. Co., 228 U. S. 364.
Hoke vs. U. S., 227 U. S. 308.
Northern Pac. Ry. vs. Boyd, 228 U. S. 482.

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17 201 U. S. 562, *Haddock vs. Haddock.*
18 210 U. S. 230, *Fauntleroy vs. Lum.*
19 256 U. S. 23, *Newberry vs. U. S.*

City of Owensboro vs. Telegraph & Tel. Co., 230 U. S. 58.
Lankford vs. Platte Iron Works, 235 U. S. 361.
Cumberland Glass Mfg. Co. vs. Dewitt & Co., 237 U. S. 447.
L. & N. Ry. Company vs. U. S., 242 U. S. 60.
Adams vs. Tanner, 244 U. S. 590.
Paine Lumber Co. vs. Neal, 244 U. S. 459.

Many objections are heard today against the right to annul a law as unconstitutional by a five to four decision. It has been suggested that a two-thirds vote of the entire membership of the Court be required before an Act of Congress could be declared void. It seems to me that if the advice of Chief Justice Marshall were followed these objections would have little ground to sustain them. "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy which ought seldom if ever be decided in the affirmative in a doubtful case. It is not any slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its acts to be considered as void."[20]

LYDA GORDON SHIVERS.

THE MOTION TO VIEW—I. THE STATUTE.—"When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation, or the place at which the offense is charged to have been committed, or the place or places at which any material fact occurred, or of any material object or thing in any way connected with the evidence in the case, the court may, at its discretion, enter an order providing for such view or inspection as is herein below directed. After such order is entered, the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property, object or thing to be so viewed or inspected, which shall be pointed out and explained to the court and jury by the witnesses in the case, who may, at the discretion of the court, be questioned by him and by the representative of each side at the time and place of such view or inspection, in reference to any material fact brought out by such view or inspection. The court on such occasion shall remain in session from the time it leaves the court room till it returns thereto, and while so in session outside the court room it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance, and to punish for contempt such as it has when sitting in the court room. In criminal trials all such views or inspections must be had before the whole court and in the presence of the accused, and the production of all evidence from all witnesses or objects, animate or inanimate, must be in his presence."[1]

II. IN GENERAL.—The motion to view is somewhat an exception to the general rule. The general rule is that such trials are to be had at the court house and in the court room, as provided by statute in the different states having provisions similar to the statute set out above which governs views and inspections in this state. The statutes usually provide for a court, for

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[20] 6 Cranch 87, *Fletcher vs. Perls.*
[1] Hemingway's Code of 1917, Sec. 2213 (Code 1906, Sec. 2720).

officers, and a place for court to be held. Objections come rather frequent to evidence under this motion to view, because the court house is the place where such evidence should be shown, and not some place other than that place. "To constitute a lawful court, therefore, the persons who assume to hold such court and dispense justice must be officially assembled under authority of law, and the court must be held at the appropriate time and place appointed therefor by law. If the person assuming to act as judge was not then invested with judicial authority (that is with the power of the law to declare and record its mandates), then his acts in attempting so to do are of no consequence whatever and void. And if he were fully invested with judicial authority, so as to make his pronouncement of the law effective, still the time and place of holding the court are equally essential; for when the law prescribes the time and place of the holding of court, then time and place are as essential limitations of jurisdiction as are subject matter and parties."[2]

Our statutes, and the statutes of other states, specify the place where such trials are to be had, and when they grant an exception it is expected by the powers that the courts will use it with great discretion and refuse to grant it when it seems unimportant, and, when it is granted, that the court will stay within the bounds provided by statute. Under such cases, all that is said and done, when there is abuse of discretion by the court, is presumed to be harmful and hurtful to the interests of the defendant, and cases are reversed on this very theory.

Our court has held that the statute above applies only to a view of the place or places that are material to the case, and a proper explanation to the jury of the surroundings, etc., at the time of the committing of the crime or other thing which is the issue in controversy, and that other evidence taken which did not tend to explain or illustrate some material thing about the place being viewed or inspected, but which only went to prove the guilt or innocence of the accused, was improperly admitted at the time and place, and that the only decision that could be taken of such error was that it was hurtful to the rights of the defendant, and that the case should be reversed because of it.

In that case, the defendant appellant was on trial for murder. After examination of one witness on behalf of the State, the State, by its district attorney, made a motion that the court remove itself to Oil Mill alley, the place where the crime was committed, away from the court house, and view the scene of the homicide. The motion was sustained over the objection of the defendant. The motion on the part of the State was made according to the directions of the statute, and the court, in pursuance of the sustained motion, repaired to Oil Mill alley for a view. At the scene the place was thoroughly explained and pointed out to the jury through several witnesses, but that was not all. The court went ahead and heard the greater part of the State's evidence there at the scene, much of which had nothing to do with the scene at all, and that over the repeated objections of counsel for the defendant. Several eye-witnesses were examined, and another or others who were not eye-witnesses. The defendant was convicted, and he appealed to the Supreme Court.

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2 *Hanley vs. Medford*, 56 Oregon 171, 108 P. 188.

In reversing the case, the Court said in part: "There is no authority of law for holding court at any other place than the court house or the place designated as such by the properly constituted authorities, which it is unnecessary to repeat here. The obvious purpose of this statute was that the court might go and with the jury see the objects and have a view of the situation and have pointed out and explained to the court, the objects there, and bring out the material facts relative to the scene. . . .

"If we hold that permitting a major portion of the trial, so far as eliciting the main facts of the homicide is concerned, in Oil Mill alley is proper, then there would be no limit to the power of the court, once he had gone to the scene, to examine the witnesses indefinitely and prolong the trial at the scene of the murder to its conclusion. We cannot subscribe to this view. As a matter of fact, it is the experience of any trial judge that a record secured by viewing the scene is very imperfect. The opportunities for unfairness on either side are broadened, and we cannot say that it would not hurt a defendant to have the trial at some other place than the place designated by law. We prefer to say that only a view of the scene may be had and witnesses examined for the purpose of a description of such scene and the material facts there seen by all, both court and jury, and we limit this statute here under review to the plain object which it is sought to obtain, and we shall not extend it to the point of permitting the development of such substantial facts other than such as are necessary to a proper description of the scene."[3]

In other cases the court has been very flat in its opposition of the trial court leaving the court house for any purpose, holding that such is harmful to the defendant.[4]

The statute is in derogation of the common law on the subject of viewing, and the court in the Jones case held that it must always be followed only by the application of the rule of "strictissimi juris."

III. Requisites.—1. Proper instructions to, and control of the jury, must be given, and the instructions must be obeyed. The statute shown above provides that court shall be in session during its trip there and back and while at the scene, and it is the rule in the court that communications may not be had with the jurors, and that ruling must still apply since the court is still in session. The statute provides for the sheriff and a requisite number of deputies to accompany the court, and some of them should be assigned to accompany the jury, in order that no interested person be allowed to communicate with it. The jury-men, usually, are allowed to talk with each other while out, but are not allowed to talk with others. The deputies, it is useless to say, must stay in sight of the jury.[5] 2. Many things may be taken into consideration when ruling on a motion to view, among others being the length of the journey, and the case in the last footnote above held a motion to take jury to scene of homicide properly denied where it was thirty miles distant, and scene had been fully described by oral testimony and located by maps and measurements. 3. There is a proper time to present the motion and there is an improper time. A case coming up from the Utah courts held that a denial of the request of the jury in a homicide case to be allowed to view

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3 *Jones vs. State*, 141 M. 894.
4 100 M. 342.
5 *State vs. Moore*, 119 La. 564, 44 So. 299.

the premises, made after the jury had retired and without notice to the prosecuting attorney, was proper.[6]

The motion to view will not usually be sustained unless there is seen by the court to be a need of it, and it can properly be refused, when maps and other testimony sufficient to give the court an adequate conception as to the situation and respective positions, etc., has been introduced.[7]

Where view of premises where homicide occurred could not have elucidated the main issue, there is no abuse of discretion in refusing to permit view.[8]

In a murder trial, where deceased was shot by defendant on the bank of a river, it was not error to refuse to permit a view of the premises; the place of the shooting being fifteen miles away, and changes having occurred in the surroundings.[9]

KERMIT R. COFER.

Contracts Made With Women of Ill-Fame for Illegal Purposes.—It is an interesting thing to know that the Supreme Court of Mississippi will not enforce a contract between keepers of houses of ill-fame, and any person contracting with them, and knowing that the subject matter of the contract was for an illegal purpose. At first blush it seems that this is a very unfair proposition, and that it would give a decided advantage to the wrongdoer, and put the merchant or business man at a disadvantage. However, when one looks into the reasons for this rule, he sees that the Supreme Court is right. We shall consider the cases in Mississippi decided on this point, and see what the law is on this subject.

In the case of *W. O. Menger, appellant, vs. Marie Thompson, appellee,* 91 So. 40, the appelant had sold a large quantity of furniture to the appellee, amounting to $4,179.95, on the installment plan. The appellee, Marie Thompson, defaulted on the payments, and the appellant, W. O. Menger, brought suit to recover the furniture. The appellee's attorneys proved that the appellant knew that the appellee was keeping a house of ill-fame, and that the furniture was to be used in carrying on the appellee's unlawful business. The Supreme Court in deciding the case said:

"Where a merchant sells furniture on credit to a keeper of a house of ill-fame for use in such business, with knowledge of the character of the buyer and the use it is to be put to, where the evidence shows that there were no other means with which to pay for the same than the proceeds of the illegal business of the buyer, such contract is contrary to public policy, and the creditors cannot maintain an action to recover the property or for the value thereof."

The Court held that the cases of *Mitchell vs. Campbell,* 111 Miss. 806, 72 So. 231, and *Ham vs. Wilson,* 123 Miss. 510, 86 So. 298, governed the case, and we shall now examine the holdings in these two cases.

In the case of *Mitchell vs. Campbell* the appellant was suing the appellee upon two promissory notes which were given as evidence of the monthly rent due in advance. The notes had been assigned to the appellant, and he now brings suit for their payment. It was brought out in the evidence that

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6 *State vs. Sirmay,* 40 Utah 525, 122 P. 748.
7 *Stanley vs. Commonwealth of Virginia,* 109 Va. 796, 63 S. E. 10.
8 *McDonald vs. Commonwealth of Kentucky,* 177 Ky. 224, 197 S. W. 665.
9 *Hall vs. Commonwealth of Kentucky,* 189 Ky. 72, 224 S. W. 492.

the house was a house of ill-fame, and that it was rented with this express purpose in view. The questions which now arise are: First, can the payment of the rent notes in the hands of an assignee be enforced? and second, did the fact that the agent of the owner, and not the owner, was the one who knew what the house was to be used for affect the court's holding? In deciding these questions the court said:

"The authorities are in accord that, if a landlord knowingly leases his property to be used for the purposes of prostitution, he cannot recover for rents which a tenant has agreed to pay. The whole contract is against public policy, and offense against morality and absolutely void. *Ernst vs. Crosby,* 140 N. Y. 364, 35 N. E. 603; *Fields vs. Brown,* 188 Ill. 111, 58 N. E. 977; *Hunstock vs. Palmer,* 4 Tex. Civ. App. 459, 23 S. W. 294; *Burton vs. Dupree,* 19 Tex. Civ. App. 459, 46 S. W. 272. Our court in *State vs. Treweilder,* 103 Miss. 859, 60 So. 1015, held that under the common law it is a misdemeanor for a landlord knowingly to rent his house for the purposes of prostitution when the house is in fact so used."

"It is argued by counsel, however, that the knowledge of the unlawful or intended use in this case is the knowledge of the agent, and not of the landlord himself. The record discloses, however, that the son in this case was evidently the general agent of the lessor in making and executing the unlawful contract, and under such circumstances we are forced to conclude that the knowledge had and possessed by the agent must be imputed to his principal. Otherwise a non-resident landlord might equip and lease the whole restricted district of the city and receive and enjoy the proceeds from the nefarious traffic, deliberately closing his eyes to any information as to the occupancy or use of any of the premises. He would thus be able to do by proxy what he could never do in person. If George C. Price had no authority to make the contract here in question, then there is no lawful contract at all. The proposition that knowledge by the agent of the unlawful purposes is binding upon the landlord is amply supported by the authorities. *Ryan et al. vs. Potwin, Trustee,* 62 Ill. App. 134; *Stillman vs. Loveless,* 152 Ill. App. 332; *Ashbrook vs. Dale,* 27 Mo. App. 649; *Fields vs. Brown, supra.* If the contract is in writing, parol evidence is admissible to expose its immoral and unlawful character. *Dougherty vs. Seymour,* 16 Colo. 289, 26 Pac. 823; *Sherman vs. Wilder,* 106 Mass. 537; *Sprague vs. Rooney,* 104 Mo. 349, 16 S. W. 505."

"If the lease contract in the present case is void ab initio, the rent notes based thereon are void, and appellant as indorsee and holder of these notes acquired nothing. In fact, no point is made that appellant as assignee has any greater rights than his assignor would have."

"The decisions have abundantly announced that courts will not lend their aid in enforcing illegal contracts. The door of the court is and must always be open to litigants having substantial rights to be enforced or wrongs to be redressed, and in searching for truth and justice much perjury, filth, and crime are often necessarily exposed. The law, however, is always on the side of morality. Courts are founded to execute the laws, and not to sanction or assist in their violation. As well said by Johnson, J., in *Bank vs. Owens,* 2 Pet. 538, 7 L. Ed. 508, 'No court of justice can in its nature be made the handmaid of iniquity.'"

In the case of *C. M. & E. G. Ham vs. Wilson,* the appellants had sold the appelle a bill of goods on the installment plan, and had not finished paying for it when she was ordered to leave town. The appellant instituted an action of replevin for the goods. It seemed quite clear that the jury believed that the seller knew for what purpose the furniture was bought, and to what use it was put, as the evidence warranted, if not compelled such belief. The court held in this case that the contract was an offense against morality, and absolutely void. The case of the *Standard Furniture Co. vs. Van Alstine,* 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960, is also in

point, and shows beyond a reasonable doubt that this rule is in effect over the entire United States.

In this case the appellants were a domestic corporation, engaged in selling house furnishing goods. The complaint was, in form, that commonly used in this state for the recovery of personal property in specie. The respondent, who was defendant below, after denying the allegations of ownership and right of possession of the property in appellant contained in the complaint, pleaded affirmatively that the appellant claimed title to the property by virtue of a certain agreement in writing by which two women purchased the property and agreed to pay appellant therefor, but without further description as to the character of the agreement. He then pleaded the recovery of a judgment by himself against the purchasers named in the agreement, the issuance of an execution thereon, the seizure and sale of the property under the writ of execution, and his purchase of the property and its delivery to him at the execution sale. He pleaded further that the vendees were, at the time of the execution of the written agreement and the delivery of the property by the appellant to them, the keepers of a house of ill-fame in the city of Seattle; that the appellants had knowledge at the time the agreement was entered into, and at the time the goods were delivered, that the vendees were the keepers of a house of ill-fame, "and that the said goods so delivered, and said written agreement aforesaid, were to aid and enable the said" vendees "to carry on and conduct a house of prostitution; and that any sum remaining unpaid on account of said goods, if any did remain, was to be paid by said" vendees to the appellant "out of the earnings of said house of prostitution." At the trial and before the examination of the witness was concluded, the court announced that the evidence was sufficient to warrant the court in holding that the contract was void as against public policy, and the court refused to let the appellant offer proofs on the matter alleged in the reply as an estoppel, and took the case from the jury, and entered judgment in favor of the respondent. The appellant in the appeal tried to show that the evidence which the trial court based its decision on was insufficient, but the court laid down the rule in the following decision, which shows how well the rule is established throughout the land:

"It is urged on behalf of the appellant that the evidence before the trial court upon which it based its judgment showed, at most, nothing more than that the appellant, at the time it entered into the contract of conditional sale and delivered the property to the vendees named therein, had knowledge that the vendees intended to put the property to an unlawful use; and that this fact is not sufficient to justify the trial court in its holding that the contract was void as against public policy. It is true that it is held in many well-considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of the vendor of goods that the vendee designs to and will put them to an immoral or illegal use is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and creditor merely, or that of debtor and creditor with a mortgage over to secure the deferred payments of the purchase price. The sale and delivery of the property was complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor. On the other hand, it is held by all of the cases—even those which announce the rule contended for by the appellant—that if the vendor has

knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover. *Tatum vs. Kelley,* 25 Ark. 209, 94 Am. Dec. 717; *Tracy vs. Talmage,* 14 N. Y. 162, 67 Am. Dec. 132; *Hill vs. Spear,* 50 N. H. 253, 9 Am. Rep. 205; *Gaylord vs. Soragen,* 32 Vt. 110, 76 Am. Dec. 154; *Aiken vs. Blaisdell,* 41 Vt. 665; *Schankel vs. Moffatt,* 53 Ill. App. 382; *Ralston vs. Boady,* 20 Ga. 449; *Webster vs. Munger,* 8 Gray 584; *Adams vs. Coulliard,* 102 Mass. 167; *Graves vs. Johnson,* 156 Mass. 211, 15 L. R. A. 834, 30 N. E. 818, and note to this case in 32 Am. St. Rep. 550; Beach, Modern Law of Contracts, 457. And there are cases which hold that knowledge on the part of the vendor that the purchaser intends to devote the property purchased to an illegal use will bar a recovery of the purchase price, even though he does no other act than deliver the property to the vendee. It was so held by the Supreme Court of the United States in *Hanauer vs. Doane,* 12 Wall. 342, 20 L. Ed. 439, though the court seems to admit that there might be a distinction between the cases where the use to which the property is to be devoted is only malum prohibitum, or of inferior criminality, and the cases where it is to be used in aid of the perpetration of a heinous crime, such as treason, as was the fact in that case. See also *Tatum vs. Kelley,* 25 Ark. 209, 94 Am. Dec. 717; *Milner vs. Patton,* 49 Ala. 423; *Lewis vs. Lathan,* 74 N. C. 283; *Bickel vs. Sheets,* 24 Ind. 1; *Steele vs. Curle,* 4 Dana 381. Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased, and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without hindrance from his vendor. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vendor, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of its contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved 'title, ownership, and possession of the property,' but reserved the right to 'take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity' of the deferred payments. This practically left the control of the use of the property with the appellant, and, as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to some unlawful use, and participating in that unlawful intent, is, to say the least, somewhat refined; and where a vendor for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts. It must be borne in mind that at common law it was an indictable offense to keep a house of ill-fame, or to let a house knowing it was to be used for the purpose of prostitution (Wharton, Crim. Law, 1459); that in this state these acts are made misdemeanors by statute; and that 'any contract auxiliary to the keeping of a bawdy house, or otherwise encouraging prostitution is void.' (Bishop, Contr., 506; *Dougherty vs. Seymour,* 16 Colo. 289, 26 Pac. 823; *Hunstock vs. Palmer,* 4 Tex. Civ. App. 459, 23 S. W. 294; *Chateau vs. Singla,* 114 Cal. 91, 33 L. R. A. 750, 45 Pac. 1015; Beach, Modern Law of Contracts, 1443.) We are aware that the appellant, though it admits that it had knowledge at the time it entered into the contract that its vendees were prostitutes, and that the house where they lived and where the goods were delivered was in a section of the city known as the 'Tenderloin District,' contends that the

evidence fails to show that it had knowledge that the house was kept as a house of ill-fame. A perusal of the entire record, however, does not leave this question in doubt. Nor was there such a substantial conflict in the evidence thereon as to compel the trial court to submit the question to the jury.''

''It is further contended that the trial court erred in refusing to permit the appellant to offer proofs of the matter alleged in the reply by way of estoppel, but in this we find no error. No principle of law is better settled than that a contract prohibited by law or morality is void as against public policy. It is because of the public interest, and not the desire to aid the defendant, that the courts refuse to enforce such a contract, and hence the doctrine of estoppel has no application. Greenhood, Pub. Pol., rule 126, and illustrations there given; Beach, Modern Law of Contracts, 1499; *Turnbull vs. Farnsworth,* 1 Wash. Terr. 444; *Ah Doon vs. Smith,* 25 Or. 89, 34 Pac. 1093.''

J. D. VOLLOR.

RECENT IMPORTANT DECISIONS

INTOXICATING LIQUORS—WHETHER POSSESSION OF LIQUOR BY GUEST IN HOTEL DINING ROOM IS TANTAMOUNT TO LIQUOR "KEPT" BY HOTEL MANAGEMENT.—For a long period of time, intoxicating liquors were habitually brought to dining rooms of hotels by patrons and consumed by them or unlawfully served to their guests and friends by means of glasses furnished by management with mineral waters, ice and other facilities also furnished by management. Under an abatement proceedings under National Prohibition Act, tit. 2, Nos. 21, 22 (27 U. S. C. A. Nos. 33, 34) condemning as nuisances places where intoxicating liquors were, among other things, "kept," the court *held* that this temporary possession of liquors by the guests within the knowledgment of the management, constituted the keeping of liquors as contemplated by the word "Kept" of the statute. *Butler Hotel Co. et al. vs. United States,* Circuit Court of Appeals, Ninth Circuit, 35 Fed. Rep., 2nd Series, 76.

This point has occupied the attention of the federal courts in several recent cases. Besides being somewhat novel, and interesting generally, the holding is interesting in that it indicates a tendency on the part of the federal courts to put a liberal construction on penal statutes as opposed to the strict construction usually resorted to. That the court would put the temporary possession by guests of liquors within the meaning of the word "kept" as applied to hotel management appears to be a rather liberal construction. In the case of *Fritzel vs. U. S.*, 17 F. (2d) 713 (C. C. A. 7th) the court interpreted the word "kept" as used by the statute to mean kept for commercial purposes. Thus it would seem that to permit customers to serve liquor in the hotel would be keeping it for a commercial purpose in that it served a commercial end by making the place desirable for customers. (*Rossi vs. U. S.*, 16 F. (2d) 713.) The statute being comparatively recent, the decisions are few, but all are in accord. *Notary vs. U. S.*, 16 F. (2d) 434; *U. S. vs. Club Chez Pierre,* 31 F. (2d) 220; *U. S. vs. Kelly,* 24 F. (2d) 133; *U. S. vs. General Amusement Co.*, 19 F. (2d) 630; *U. S. vs. Budar,* 9 F. (2d) 126.

N. H. MALONE.

DIVORCE—CONSTITUTIONAL LAW—HUSBAND AND WIFE.—Suit by one Cherie Fanchier against one Paul Gammill to punish defendant for contempt of court for failure to pay alimony under previous decree. In the State of Nevada, Cherie Fanchier obtained a divorce from Gammill and obtained alimony, further having her maiden name restored. In a suit in Mississippi Chancery Court, Cherie Fanchier obtained a judgment against Gammill for payment of back alimony. This judgment was not satisfied by Gammill, and a petition was filed by Cherie Fanchier praying that Gammill be cited to show cause why he should not be punished in contempt of court for failure to satisfy the judgment.

Held—Under Sec. 159 of Constitution of 1890, the Chancery Court has full jurisdiction of divorce and alimony and may enforce a decree or judgment of another state for alimony and in enforcing its judgment may use contempt proceedings and other legal methods—execution upon the judgment, garnishment, ne exeat republica, and any appropriate proceeding recognized in the law.

The obligation of the husband to support his wife is not merely a contractual obligation, but is founded in part upon the public policy; it is a public duty established by law, and not a debt in the ordinary sense of that term, or in the sense of the Constitution prohibiting the imprisonment for debt, but the husband may be forced to perform this duty by contempt proceedings or by criminal statute.

Decree giving alimony being marked Ok. by husband's attorney, before the Chancellor signs, does not make decree "consent decree," but merely shows it to be in proper form to conform to the oral judgment rendered by the Chancellor. *Fanchier vs. Gammill,* 124 So. 365.

It is a general rule followed by weight of authority that the constitutional prohibition against imprisonment for debt applies only to contracts, express or implied, and does not extend to actions for torts. *People vs. Walker,* 286 Ill. 541; *Miss. vs. Widman,* 112 Miss. 1; *Stidham vs. Du Bose,* 128 S. C. 318.

Imprisonment for failing to pay alimony is not violation of constitutional prohibition of imprisonment for debt. *Cain vs. Miller,* 109 Neb. 441; *In re. Whallon,* 6 Ohio App. 80; *West vs. West,* 126 Va. 696.

Alimony is not awarded as a debt, but for the enforcement of a duty growing out of the marital relation, which is certainly not excused by the husband's misconduct. Alimony is not strictly a debt due to the wife, and it is not a debt or liability which the wife can assign, or which can be appropriated for a debt existing prior to the divorce. It is not a debt provable in Bankruptcy—Words and Phrases Judicially Defined, Vol. 2, page 1866, citing the legion of cases upholding this principle.

The Supreme Court of Mississippi in the case of *Gammill vs. Fanchier,* 124 So. 365, follows this impressive line of authorities by holding thus: Imprisonment for failure to pay alimony under court's decree so to do, is not imprisonment for debt such as was and is concerned in the constitutional prohibition of imprisonment for debt. *Edmonson vs. Ramsey,* 122 Miss. 450; *Rhinehart vs. Rhinehart,* 126 Miss. 488.

This case is in accord with a holding in Mississippi, *Millis vs. State,* 106 Miss. 131, holding that where a husband fails to pay installments of alimony, wilfully and deliberately ignoring the orders of the court, he was properly sentenced to confinement until the alimony was paid.

It is the common law duty and statutory duty of the husband to support his wife, a duty which he owes to the State, and to his wife. This duty is not, properly speaking, a debt owed either to the wife or the State, but is in its nature, moral as well as legal, and depends on the marriage relation. 30 C. J. 517-518. E. J. SIMMONS, Jr.

RAILROADS—WHETHER EVIDENCE THAT LOCOMOTIVE SET FIRE TO PROPERTY SUFFICIENT TO GO TO JURY.—The plaintiff insured a warehouse of one

Agor, located at Badger, Washington. The warehouse was situated about 50 feet from the defendant's railroad track. The fire occurred between 7 and 10 o'clock in the evening, during which time the defendant's train passed. The fire was under way 20 minutes after the train passed. The track was level for several hundred yards before the train reached the warehouse, and no wind was blowing at the time the fire started. No one saw the warehouse catch on fire, the only evidence that the defendant's train set it on fire being that the fire broke out shortly after the train passed. Agor's claim against the defendant subrogated to the plaintiff insurance company, who brought suit against the defendant railroad company, alleging that its engine set fire to the warehouse. *Held*—Evidence insufficient for case to go to the jury on the issue of whether the defendant's engine set the fire. Directed verdict for defendant. *General Insurance Company of America vs. Northern Pacific Ry. Co.*, 50 Supreme Court Rep. 44, 1929. United States Supreme Court.

Chief Justice Taft said that there must be more evidence than the mere fact that the train passed shortly before the fire in order to let the case go to the jury. The facts must at least show a probability that defendant's engine set the fire; a mere possibility that it did so not being sufficient. The court said: "In all cases that go to the jury there must be some evidence from which the jury might reasonably infer with reasonable certainty that the fire would not have occurred unless set by the passing train." In other cases it is held that evidence that sparks from the train blew toward the destroyed building would be sufficient to let the case go to the jury. *Wardlow vs. Southern Ry. Co.*, 122 Miss. 180.

The decisions of the courts on this point are by no means all in harmony with the principal case. The holdings of the Mississippi Supreme Court are to the effect that evidence that a fire broke out shortly after the passage of an engine should go to the jury to determine if that engine set the fire, this being the only evidence. *I. C. R. R. Co. vs. Thomas*, 109 Miss. 536; *G. M. & N. Ry. Co. vs. Sumrall*, 142 Miss. 56.

Though Mississippi is well supported in its holding (*Theresa Village Mut. Fire Ins. Co. vs. Wisconsin Cent. Ry. Co.*, 128 N. W. 103, 144 Wis. 321), the reasoning of the principal case seems stronger. It must not be forgotten that the burden is on the plaintiff to prove his case, and the mere fact that the defendant's engine passed shortly before the fire, there being no other evidence, does not seem to satisfy that burden. There should be some further showing connecting the passage of the engine with the fire, showing that the engine probably did cause the fire. If the plaintiff can show only a possibility that the defendant's engine caused the fire, the defendant should be granted a non-suit. JASON H. FLOYD.

CONTRACTS—DISCHARGE OF.—Suit by M. M. Vinson against T. Ford Leggett et al. on an oral contract to build a house, entered into between the appellant and appellee on about the second day of August, 1928. From the evidence on the trial it appeared that appellee had begun the house under a written contract with appellant. That after the work had progressed for six or seven weeks under the written contract, appellee came to appellant and told him that he could not go on any longer under the written contract.

Appellant then told him that he liked his work and to go on with the building and he would pay all the material and labor bills, and the appellee so proceeded. This suit is for the remainder of the contract price under the oral contract. Judgment in lower court for appellee (*Leggett et al. vs. Vinson*, 124 So. 472, Sup. Ct. of Miss.).

The court held that there was no consideration for the subsequent oral contract and that such a contract could not be enforced, laying down the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support promise by other party to contract to give the former an additional compensation or benefit, and such promise cannot be legally enforced, although other party has completed his contract in reliance upon it.

The declaration in this suit was filed on the oral contract. The issue presented to the jury was whether the house had been built under the old contract or the oral contract, and the jury by their judgment found that the house was built under the oral contract. Now, there is a well settled rule of law in Mississippi that those facts which a jury finds to be true are true and will be accepted as true by our appellate courts. In this case the jury by their verdict found as a fact that the parties entered into a new contract for the building of the house and the house was completed under it, and that Dr. Leggett still owed the appellee part of the contract price. Then the Supreme Court by its decision here finds that the house was built under the written contract, in direct contradiction to the finding of the jury that the house was built under the oral contract. It seems to me that the court overlooked the effect of the verdict of the jury, and the facts the jury found to be true. The jury in this case found that the written contract between Vinson and Leggett was annulled by the parties themselves. If that be true—and the jury said it was true—then all of the obligations that the parties had assumed under that original contract were cancelled by mutual consent. In other words, there was no longer any contract between them. Now, it would be a new and strange doctrine for any court to hold that in this state of the matter the same parties who got rid of one contract could not make another one. The same jury which found that the old contract was abrogated found that the parties then made a new contract and assumed new obligations. It is no new thing for parties to abandon one contract and make another one, but it seems that the effect of the decision in this particular case, in view of the verdict of the jury, amounts to the reverse of this well-known proposition. HENRY HILBUN, Jr.

PROBABLE CAUSE FOR SEARCHES AND SEIZURES—AUTOMOBILES—INTOXICATING LIQUOR.—An officer of the City of Jackson heard by information that the defendant was selling intoxicating liquors. Upon seeing defendant riding in a car through that city, the officer followed him. The defendant, realizing this and becoming frightened, threw a pint bottle of whiskey from his car, which was examined by the officer, who, upon finding that it contained whiskey, further pursued defendant, stopped him, and searched his car, which was found to contain eight pints of intoxicating liquor. The officer had no search warrant for defendant's car. The defendant was tried, convicted and sentenced for the possession and transportation of liquor, and

the liquor thrown from the car and that found in the car was admitted in evidence against him. He appealed on the ground of the search of his car being illegal. *Held*—That the search was illegal, as no probable cause for suspicion of defendant was present when the search began, for the search is held to have started at the instance of pursuit and whiskey thrown from the car during said pursuit was discovered as a result of and during the said illegal search. *Ford vs. City of Jackson*, 121 So. 278.

The court in deciding this case seems to have, in its reasoning, stretched the extent of the search, complained of, over an unreasonable length of time, thus giving the defendant an extremely lenient interpretation of the law. Viewing the search, as they have, as beginning at the instance the officer began to follow the defendant, the holding is entirely correct and could not have been otherwise, but, in my opinion, it seems unreasonable to hold that the search began at that instance. If the officer had never stopped defendant's car and searched it, there could not have possibly been any search made. Therefore why hold that the search began at the instance of pursuit, when the search proper could not possibly have taken place until the defendant was restrained and his car searched. His throwing of the pint of whiskey from the car was certainly sufficient cause to the officer to believe that there was liquor therein; and this took place soon after the officer began following the defendant, and before the search of the car took place. In the case of *Eady vs. State*, 121 So. 293, the mere smell of whiskey near the car was held to have given the officer probable cause for searching the car without a search warrant. Is this case so different from the present one, in which the officer saw liquor come from the car, that the holding should be entirely different? Has not the law, "seemingly," been stretched a long way in the holding of the court that the search began at the instance the officer began following the defendant? The holding of the court in regard to probable cause is amply supported by numerous cases of record, *Sellers vs. Lofton*, 149 M. 849, 116 So. 104; *Butler vs. State*, 135 M. 885, 101 So. 193; *Hester vs. U. S.*, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898. The determination of the court in regard as to when the search started does not seem to be so numerously supported, but can "seemingly" be justified only through the facts of the case and the interpretation of what will constitute a search.

T. H. CAMPBELL, Jr.

AUTOMOBILES—STATUS AND SCOPE OF EMPLOYMENT OF OPERATOR.—The defendant company was owner of the automobile in question. A salesman of the defendant with authority had been demonstrating the car to one Walker, a prospective purchaser, and had taken a trip with him for that purpose and returned to defendant's place, when the salesman gave Walker permission to drive the car to his (Walker's) home to exhibit it to his wife before making the purchase. While the car was in Walker's possession and being driven by him, the collision for which this suit is brought occurred. The plaintiff invoked the doctrine that a demonstrator of a car for a dealer, in order to effect a sale, is the agent of the dealer in so doing, and that the dealer is therefore responsible for his negligent conduct while operating the car. The lower court sustained the contention and found for the plaintiff, Rucker. *Held*—On appeal, that doctrine sustained by lower court was not

applicable where salesman has intrusted the car to the prospective buyer, unless he knew that the prospective purchaser was negligent. *Cruse-Crawford Mfg. Co. vs. Rucker,* Supreme Court of Ala., 1929, 123 So. 897.

Although the Mississippi court has not decided a case directly in point, in an analogous case, *Anderson vs. Daniel,* 139 Miss. 456, the court held that where the father intrusted a car to his son, knowing of the negligence of the son, he became liable for damages caused by child while driving. This, in effect, is the same holding as the present case. The doctrine invoked by the plaintiff that the demonstrator of a car is the dealer's agent is correct and is supported by numerous authorities, Berry on Automobiles (6th Ed., p. 1196). However, the court here holds that this doctrine does not comprehend prospective purchasers who are driving cars under the circumstances of this case. Although the case establishes no new principles, it affords information as to the dealer's liability when prospective purchasers are driving and operating cars belonging to the dealer, which is a practical, everyday occurrence with automobile dealers. CARY STOVALL.

EMINENT DOMAIN—RIGHT OF FEDERAL GOVERNMENT TO TAKE PROPERTY UNDER FLOOD CONTROL ACT WITHOUT FIRST PAYING FOR IT.—Proceeding at law by the United States against Col. Frank P. Stubbs and others to condemn land for the building of a portion of a levee under the Flood Control Bill (33 U. S. C. A., paragraphs 702a-702m, 704). Primarily, the purpose of this suit is to determine the procedure and requirements necessary to permit the taking of the property desired, and the larger issue of whether actual work upon the guide levees of the general project shall commence or be restrained remains to be heard in the case of *Kincaid vs. The Secretary of War et al.,* now pending in this court. The case under consideration, however, decides the question concerning the right of the government to take the condemned property without first paying for it by interpreting section four of the Flood Control Bill, which immediately appropriated $30,000,000 for all purposes of the present time.

There was a letter from the Secretary of War to the Attorney General, stating that funds were available to pay for the particular property in this instance. The question was as to whether the appropriation along with this letter was sufficient to meet the requirements of the law to authorize the taking of possession.

The court held, first, that the provision for immediate taking and dispossessing of the owner of private property without its value first having been paid is a drastic one, but, in the absence of constitutional inhibition, such a statute is valid. *Sweet vs. Rechel,* 159 U. S. 380, 40 L. Ed. 188. There is no such restriction in the Federal Constitution. It was further held that the title to property taken by the government under the Flood Control Bill vests in the government only after final judgment of condemnation and payment of sum fixed therein to the owner. There was a further holding that the government's power of condemnation of property for public use is subject to constitutional limitation that owner shall be promptly paid without extraneous controversy and unnecessary delay. The final holding of the court was that of requiring a deposit in the registry of the court or

in an official depository, subject to the orders of the court, of funds sufficient to cover the maximum value that may be found for property in question. This requirement is made in order that the money may be placed under the control of the court. *United States vs. Stubbs et al.*, 35 Fed. (2d) 357.

F. H. MONTGOMERY.

AUTOMOBILES—CONTRIBUTORY NEGLIGENCE OF PASSENGER—NEGLIGENCE.—Plaintiff, together with the defendant and another youth, was riding in a car, being driven by defendant, along a paved road. It was about nine o'clock at night and all three parties were sober. Plaintiff was sitting on the extreme right of the roadster, with defendant driving and the other youth in the center of the car's single seat. During the ride the plaintiff fell asleep. While defendant was attempting to pass another car, he struck a rock by the side of the road, causing the car to be turned over and wrecked. Defendant and the other youth were not seriously injured, but plaintiff was seriously hurt. He brings this action to recover damages, charging the negligence of the defendant as the proximate cause. *Held*—That because plaintiff was asleep in the car he was so contributorily negligent to the cause of his injury that he can recover nothing of defendant. *McDermott vs. Sibert*, 119 So. 681.

The particular point of interest in this case arises from the peculiar circumstances upon which it arose and upon which the decision was based. The fact that a person, by falling asleep in a car, shown to be driven by an experienced driver, can be so contributorily negligent by such an act as to preclude himself from recovery in case of injury received in a wreck, is unique, to say the least. The Supreme Court of Alabama has held here that the fact that the plaintiff was asleep when the accident occurred was the proximate cause of his injury. This holding certainly places a responsibility upon all the occupants of a car to remain vigilant during their occupancy of it and ready at every moment to meet any emergency which might arise. The law of Alabama is recognized, however, to be that ". . . a person riding in an automobile, driven by another, is not absolved from his personal care for his own safety, but is under the duty of exercising reasonable care to avoid injury," and this rule is well supported by the following decisions: *Chesapeake, Etc., Tel. Co. vs. Merriken*, 41 A. L. R. 764; *Campion vs. Eakle*, 47 A. L. R. 289; *McGeever vs. O'Bryne*, 203 Ala. 266, 82 So. 508; *Birmingham Ry., L. & P. Co. vs. Barranco*, 203 Ala. 639, 84 So. 839. To preclude the plaintiff from recovering because he went to sleep while riding seems to place more than a reasonable exercise of care upon the occupant of an automobile who is not driving and has nothing to do with the operation of the car.

T. H. CAMPBELL, Jr.

BANKRUPTCY—EQUITY.—W had filed petition for discharge in bankruptcy. His discharge was contested on the ground that four years previous to adjudication he had made financial statement to Bank of Italy, wherein he omitted a large indebtedness that he owed his wife, and which indebtedness constituted one of the largest claims allowed in this proceeding. He obtained credit on this representation, but such indebtedness had been dis-

charged some two years prior to adjudication, and the Bank of Italy was no longer a creditor of the bankrupt or in any wise interested in the bankruptcy proceeding.

The District Court confirmed the master's report, *holding*, that such act operated to bar bankrupt from right to discharge. *In Re Weinstein*, Dist. Court, S. D. Cal. (1929), 34 F. (2d) 964.

This is one of the first cases that throw light on the effect of the amendment of 1926 on Bankruptcy Act No. 14 (b) (3). This subdivision was first made a part of this section in 1903 and was limited to property or credit obtained on false statements in writing, etc. It was further amended and broadened in 1910 so as to include money as well as property and credit. And the amendment of 1926 further broadens the requirements on the part of the bankrupt. This case is interesting therefore as throwing light on what the latest amendment has accomplished.

Under the new amendment it is no longer necessary that such discharge be opposed by the creditor furnishing the credit on such false representation or statement, but such matter may be preferred by any creditor or interested party. *In Re Harr. D. C.*, 143 F. 421; *Friend vs. Talcott*, 228 U. S. 27, 33 S. C. 505, 57 L. Ed. 718.

This case establishes that there is no time limit within which such false statement shall be made or published, making it practically impossible for the former sins of the bankrupt to be forgiven him, if they are in any way related to the present proceeding. *Joseph vs. Powell & Campbell*, C. C. A. 213 F. 627. N. H. MALONE.

Banks and Banking—Liability of President for Statement to Depositor Regarding Bank's Condition.—The defendant was the president of a bank in which the plaintiff had a large amount of money on deposit. When the plaintiff started to remove his money from the bank on account of what he believed to be its unstable condition, he was told by the defendant that the bank was solvent and in a sound condition, upon which representation the plaintiff left the money on deposit. At that time the bank was insolvent, it later closing its doors, the plaintiff losing the money he had left on deposit. It was not proved that the defendant knew of the unsound and insolvent condition of the bank at the time he made such representations to the plaintiff. The plaintiff brought this action for deceit against the defendant for damages to the amount he had lost by leaving his money on deposit. *Held*—That defendant was in such a position that it was his duty to know the truth or falsity of his representation, and that he was liable for the damage caused the plaintiff through his reliance on such statements as much as if the defendant had known them false when he uttered them. *Hinson vs. Drummond*, 1929, Supreme Court of Florida, 123 Southern Rep. 913.

The court said, "Wherever a person makes a false representation of a material fact to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon, amounting to a substantial change of position, and the special situation or means of knowledge of the party making the statement were such that it was his duty to know as to the truth or falsity of his representations, such party is in

law guilty of a fraud as much so as if he actually knew his statement was false. In accord: *Watson vs. Jones,* 41 Fla. 241; *Wheeler vs. Baars,* 33 Fla. 696; *Mizell et al. vs. Upchurch,* 46 Fla. 443; *Sims vs. Eiland,* 57 Miss. 607; *Clopton vs. Cozart,* 13 S. & M. 363; *Felix vs. Shirey,* 60 Mo. App. 621.

JASON H. FLOYD.

PARENT AND CHILD—LIABILITY FOR TORTS OF MINORS.—Plaintiff sought to hold defendant liable in damages for the tort of defendant's minor son, Albert Goelz, in negligently destroying and demolishing car belonging to plaintiff. The car was sold to a Rent-A-Car-Co., who rented same to the minor, Albert Goelz, mortgage being reserved by plaintiff. Albert Goelz was not domiciled with defendant, his father, but had been locked out of the family domicile for three months prior to the accident, and for three months after the accident.

Held—1. Revised Civil Code, Article 2318, providing that the father, or after his decease the mother, is responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons, is in derogation of common right, and should be strictly construed.

2. Father is liable, under this article of R. C. C. (2318), unless he can produce evidence showing that by some act of law, residence of minor has been changed from that of his own, under Article 39, providing that domicile of minor not emancipated (by act of law) is that of father, mother, or tutor.

3. Minor having rented automobile, and entered into a contract requiring him to safely return it, and automobile, while driven by minor, was demolished, precluding return thereof. *Held*—Under Article 2318, R. C. C., father not liable, since the contractual obligation and tort liability are so inseparable that to hold father liable would, in effect, be holding him liable for the minor's breach of contract. (The loss being occasioned by a breach of contract, even though the breach was caused by a tort.) *Maloney vs. Goelz* (124 So. 606), Ct. of Appeals of La.

The general rule of the common law is that a parent is not liable for the tortious acts of a minor child on the mere ground of parental relationship, but the parent is responsible only on the same ground that he is for the torts of other persons—as for example in the case of master and servant, where the tortious act was done by the infant in the course of employment, in which case the parent would be liable because of the doctrine of *reponseat superior. Dempsey vs. Frazier,* 119 Miss. 1, following *Winn vs. Holliday,* 109 Miss. 691. On this specific point—but if the father authorizes or ratifies the tort he is liable therefor. *Howell vs. Norton,* 134 Miss. 616. In Mississippi we are bound by the common law in the absence of statute. The general tenor of our law covering this point leads one to the belief that in case of a statute, the holdings in the case of *Maloney vs. Goelz,* 124 So. 606, would control or greatly influence our court in its decision. *Lemke vs. Ady,* 159 N. W. 1011; *Taylor vs. Stewart,* 90 S. E. 134; *Elms vs. Flick,* 126 N. E. 66; *Trahon vs. Smith,* 239 S. W. 345; *Hopkins vs. Droppers,* 198 N. W. 738.

Under the R. C. C., Article 2318, the father is only liable for the acts of the minor when such child is residing with him or with some person in

whose care he had placed him. *Toca vs. Rojas,* 93 So. 108. The burden of proof is on the father to show that by some act of law the residence of the minor has been changed from that of his own, since otherwise a person attempting to hold father liable would find himself under necessity of investigating and determining whether there was non-residence because of some act of the law excusing the father from liability. *Maloney vs. Goelz,* 124 So. 606. This case was decided on the rules found by the Louisiana courts in the case of *Doumeinz vs. Haydel,* 9 La. 446.

E. J. SIMMONS, Jr.

Criminal Law—Examination of Witnesses—Appeal to Race Issue.—A deputy sheriff and another, whom the deputy had called upon to assist him, were proceeding to the arrest of the accused upon information directly received that the appellant had committed the crime of robbery on one of the highways of the county. The appellant, in attempting to escape, shot one of the deputies with a pistol with which he was armed. The appellant was indicted for assault with intent to murder. In the course of the trial he was referred to by the state's witness as this "nigger" or that "nigger." The judge admonished the witness to refer to the appellant as the defendant. Momentarily forgetful of the admonition, the witness continued to refer to the appellant as that "nigger." The appellant contended that this was an appeal to the race issue to such an extent as to prejudice the jury. *Held*—Not, in view of the circumstances, to constitute an appeal to the race issue sufficient to require reversal. *Gore vs. State,* 124 So. 361.

That no man shall be convicted upon an appeal to the race issue is firm and settled law. Hence, the holding in this case announces no new law. Nevertheless, it is interesting to note the latitude allowed, and to see that our court will not throw itself into reversal on mere theory of appeal to the race issue, when the substance is wanting, and no apparent and real prejudice has been caused.

CARY STOVALL.

BOOK REVIEW

MISSISSIPPI CONSTITUTIONS. By Geo. H. Ethridge, Jackson, Miss. Tucker Printing House, 1929. Pp. 784.

Judge Ethridge of the Mississippi Supreme Court has collated all of the constitutions of Mississippi from the beginning of the government to date, and also copies of the provisional and permanent constitutions of the Confederate States, and a copy of the Constitution of the United States, into one volume of 784 pages.

The Mississippi Constitution of 1890 is taken up section by section and the sections explained, and purpose which they are designed to serve is commented upon by the author. This commentary under each section is followed by annotations of the Mississippi Supreme Court decisions construing the section and embracing all of the court decisions bearing on such section down to the beginning of the September term, 1928. The treatment of the Constitution of 1890 comprises 479 pages of the book. The opening chapter of the book deals with the duties and obligations of citizens and is entitled "The Ideal Citizen," and is a suitable introduction to the work. The second chapter deals with the powers of government for good and evil, showing the various uses of government and their abuse. The author then takes up the distribution of power between the officers of the government, that is, the several separate departments of the government, and also the distribution of power between the national government and the state government. This is followed by rules for construing the Constitution, with annotations of court decisions upon that subject. He then takes up the bill of rights, which is elaborately treated, being fully explained, section by section, and followed by court decisions, which are very numerous under many sections. The treatment of the bill of rights occupies 103 pages of the book.

The book then takes up the legislative department and deals with the qualifications, rights, and privileges of the members, time and place of meeting, and the rules of procedure prescribed by the Constitution, with a full explanation of the purposes intended to be served by these rules.

The executive department is taken up section by section and all offices provided for in the Constitution, both state and county, receive full treatment. Then the judicial department is taken up and sections of the Constitution with reference thereto receive full and elaborate treatment.

The article on corporations is then taken up section by section, with full comments upon each section, together with court decisions construing the several sections. The subject of education is taken up, with the several constitutional provisions thereon treated fully, with court decisions construing the several sections. Next the subject of the militia is taken up and this, too, treated section by section by the author, and court decisions collated under each section. Next the levees, and provisions with reference thereto,

are fully treated. This is followed by a chapter on franchise, which is fully treated, with explanations of the system adopted for the purpose of securing intelligent white rule in the state. The statute of mortmain contained in the Constitution is also fully treated, and likewise the subject of amendments to the Constitution with comments upon a constitutional convention, and a suggested addition to the Constitution providing for restrictions and conditions upon which the legislature may call such a convention. The subject is interestingly treated, and the dangers of adopting a constitution without referring it to the people fully treated.

The Constitution of 1890 is followed by the act of Congress establishing a territorial government for Mississippi, approved April 7, 1798, and a later act passed and approved May 10, 1808; and the enabling act of 1817 authorizing the people to form a constitution for the state. The act admitting Mississippi as a state follows, and this is followed by a full text of the Constitution of 1817, a full text of the Constitution of 1832, with amendments and annotations, and by a full text of the Constitution of 1869 with annotations. This is followed by a full text of the provisional Constitution of the Confederate States, and the permanent Constitution of the Confederate States, and the Constitution of the United States, with the dates of the ratification of the original Constitution by the several states and the adoption of the several amendments to the Constitution of the United States by the several states.

Next is a chapter giving the rules of the United States Senate for the trial or impeachment, with forms prescribed in such rules. This is followed by a chapter on the initiative and referendum, pointing out the better fitness of the legislative department for law-making and the necessity of discussion and consideration together with the power of amendment as a necessary incident of law-making. This is followed by the great speech of Senator George in the United States Senate, shortly after the Constitution was adopted, in defense of the Constitution. This speech covers 110 pages, 8 point type. This is followed by the closing chapter entitled "The Weak Place in Constitutional Government," and treats of martial law.

One of the most interesting discussions of any section of the Constitution is one which prohibits the legislature from ever paying or legalizing the Planters' Bank and the Union Bank bonds. The book refers to several articles upon the subject of such bonds and reviews the litigation and legislation involved in them, and makes the suggestion that, inasmuch as there was a full discussion on the subject in several political campaigns prior to the Civil War, and that there was a full discussion in 1875 when the constitutional provision prohibiting their payment was first adopted, and also that it was deliberately re-adopted by the great body of patriots who formed the Constitution of 1890, there must have been some just grounds for the act of the people in repudiating the bonds; and the decision upholding their legality was made in the face of the fact that constitutional provisions were disregarded in passing the statute pledging the state's credit to these banks.

Judge Ethridge's book has been frequently commended by people who have read it as being a valuable work not only to lawyers but to all those interested in the subject of state government. It certainly gives a comprehensive view of the organic law of the state and a full understanding of the several provisions, together with much of the history bearing upon the

subject. It is a book that reflects much investigation and study, and it is not only the result of reading and study but the author has had much practical experience in dealing with the government as well as the administration of the law. He had been in the practice of law from 1894 to the time he was elected to the Supreme Court, and served four years in the state legislature, eight years as attorney for the county board of supervisors, having jurisdiction of county affairs, and four years in the attorney general's office, in which positions he has come into contact with practically every branch of the government. As attorney for the board of supervisors, all county affairs being brought before the attorney for advice, he came in contact with county affairs in all of their ramifications. The attorney general is advisor of all state offices and the legislature, and represents the state in all of its litigation, or may do so in the proper case.

The discussion upon the evils of martial law, and the necessity of constitutional safeguards in the light of decisions in other states, is well worth studying. The author has sought, in treating the state constitutions, not only to discuss the provisions of the state Constitution itself but also the provisions of the United States Constitution that impose restrictions or limitations upon state government. These are treated in connection with the state Constitution bearing upon it. For instance, the United States Constitution prohibits slavery and involuntary servitude, and so also does the state Constitution, and the Fourteenth Amendment prohibits taking life, liberty, or property without due process of law, and the state Constitution does the same. Many of the sections are related to provisions in the Federal Constitution and are fully treated, the limitations themselves being set out in the work.

This book has been written so as to combine a study of constitutional history with constitutional law. Most text writers do not venture beyond the court decisions, and sections not construed by the courts usually receive but scant treatment, if any at all. In "Mississippi Constitutions" this is not true; the author explains the purpose and meaning of the section as he understands it in the light of his experience and study, regardless of whether it has been brought into litigation or not. The book is recommended to the bar and to citizens interested in the subject of state government and, as all states have constitutions containing many provisions identical or similar to each other, the book would be interesting to lawyers and citizens of other states who are interested in state government.

C. M. SWANGO, Jr.

CASES ON INTERNATIONAL LAW. By Manley O. Hudson. St. Paul: The West Publishing Co., 1929. pp. xxxv, 1538.

This collection of cases and other materials on international law is designed, chiefly, for students in American law schools. The selection and presentation of this data have been made with a view to facilitating the discussion of the problems which most frequently arise in the practice of law and in the current relations of governments.

More than a generation has passed since the publication of the first American casebook by Freeman Snow, in 1893. In 1902 Dr. James Brown Scott published a collection of cases selected from decisions of English and

American courts in which Snow's arrangement prevailed; and twenty years later he published a second collection, which has been the chief reliance of American students and teachers ever since.

In publishing this book the author has met an insistent demand for a work which would treat, comprehensively, not only the subject of international law as it was prior to the World War, but as it is today, modified and developed by litigation incident to the World War and the turbulent decade which followed it. This decade has dealt with so many difficult international problems, and in their solution many frontiers of the law have been extended that it behooves the student who would acquire a thorough knowledge of the important subject of international law to use this important contribution which takes into consideration the work of tribunals of the Permanent Court of Arbitration created in 1899 which has been continuing during this period; the Permanent Court of International Justice, created under the statute annexed to the Protocol of December 16, 1920, which has become firmly established; the application of many claims commissions to principles of international law, and the great impetus from the establishment of the League of Nations which the progress of international legislation has received. All of this development and extension of international law the editor has attempted to reflect in the selections made for this collection.

In this work, in arrangement, Mr. Hudson makes some departures from the earlier collections, due to the changes in emphasis since those collections were published. More emphasis is placed upon the law of nations in times of peace than the law governing the relations of nations in the time of war. In the first chapter on "The Society of Nations" the author intends to place before the student the outstanding features of our present state system. Each of the several following chapters deals with the basic factors of this system, as problems concerning them are daily arising in the busy lawyer's practice.

There is not as much space given to the chapters of war and neutrality as has been accustomed, which the author feels is fitting and in keeping with the emphasis on those parts of international law which must find place in the learning of a practicing lawyer or government expert, and which makes it seem improbable that the daily work of lawyers of the next generation will be more concerned with the problems of war.

This voluminous work has decisions from courts which do not have the Anglo-Saxon system of law within it, in spite of the fact that the necessity for an accurate translation, and the difficulty of presenting explanatory matter makes such incorporation very difficult. As is pointed out by the editor, it is because of such obstacles that the number is not larger than it is. In a few instances, as in the section on naturalization in Chapter 3, the cases presented deal mainly with the national law of the United States, which the author feels is necessary for meeting the needs of the American law students. However, wherever possible, the editor has included cases decided by tribunals bound to apply the general law of nations as distinguished from those parts of it which have been received into the law of a single nation. Opinions of such tribunals, though frequently too long to be entirely given, have all necessary omissions clearly indicated.

As a textbook it no doubt will prove a great asset to the students of international law not only from an academic but also from a practical standpoint, and the author is to be commended for his laborious and exhaustive contribution.

THOMAS P. BRADY.

LAW FOR ENGINEERS AND ARCHITECTS. By Lawrence P. Simpson and Essel R. Dillavou. St. Paul: The West Publishing Co., 1929. Pp. 633.

The purpose of the present volume is to furnish, for a course in Engineering and Architectural Law, a classroom book which deals with the law as particularly applied to these professions. The purpose of the present volume is: (1) To state the fundamental principles of law in those branches which bear most directly upon the engineering and architectural professions, and (2) to illustrate these principles so far as is possible, with cases involving engineering problems in which engineer, architect, builder, or owner are involved as parties to the suit. Experience has shown that the students' interest is keenest when specific cases are under discussion, and particularly where these cases involve problems encountered in the past by others in the practice of his own profession. This is the first attempt to prepare a case-book for engineering students. Text matter is included, however, to supplement the cases.

A brief but well written introduction in five chapters, under the heading of Law in General, gives an outline of the sources, development, nature, and procedure of our system of law.

More than one-third of the book is devoted to the subject of contracts. Although the principles of law therein stated are general propositions applicable to similar situations wherever they may be found, yet the emphasis throughout is upon engineering matters and the majority of the cases which have been selected are cases dealing with difficulties encountered in building and construction. The parties to the suits are for the most part owner and builder, engineer and architect. In addition to the subject of contracts, the subjects of agency, workmen's compensation, mechanics' lien, property, public utilities, negotiable instruments, and sales are covered in different sections of the book. An appendix includes a number of standard forms for construction of contracts, invitation to bidders, and like matters.

THOMAS P. BRADY.

BOOKS RECEIVED

PSYCHOLOGY FOR THE LAWYER. By Dwight G. McCarty. New York: Prentiss Hall, Inc., 1929. Pp. xiii, 723.

MISSISSIPPI CONSTITUTIONS. By Judge Geo. H. Ethridge. Jackson, Miss.: Tucker Printing House, 1929. Pp. 784.

LAWRENCE ON EQUITY JURISPRUDENCE. By Fred F. Lawrence. 2 vols. Albany, N. Y.: Matthew Bender & Co., Inc., 1929. Pp. cxcv, 1407.

CASES AND OTHER MATERIALS ON INTERNATIONAL LAW. By Manley O. Hudson. St. Paul: The West Publishing Co., 1929. Pp. xxv, 1538.

CASES ON THE LAW OF PROPERTY, WILLS DESCENT AND ADMINISTRATION. By George P. Costigan. St. Paul: The West Publishing Co., 1929. Pp. xxi, 888.

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MISSISSIPPI LAW JOURNAL

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VERY SPECIAL

To the Members of the Mississippi State Bar Association:

The 25th annual meeting of the Mississippi State Bar Association will be held at Biloxi, Mississippi, on the 30th day of April and the 1st day of May 1930. The Buena Vista Hotel will be headquarters for the meeting.

At the Clarksdale meeting of the Association in 1929, it was unanimously voted that the Association hold its annual meeting in 1930 at Oxford and the University. These communities were delighted with the honor of having the Association hold its meeting in their midst. The primary purpose of the Association in holding a meeting at the University was to dedicate the new law building, which was in course of construction. It was thought at the time that the law building would be completed and the Law School installed in it when the time for the Association's meeting arrived. In this we have been disappointed. The building is incomplete now and will be in an incomplete condition on April 30th. It is not practical to dedicate an incomplete building in which none of the meetings of the Association can be held. Then too, it was hoped that the University Cafeteria would be completed and in use by the date of the meeting. In this we have been disappointed too. With a large attendance, such as is forecast, by letters and reports from all sections of the State, it would be practically impossible to adequately and comfortably take care of the meal proposition without the cafeteria.

The President of the Association, with these conditions existing, was unwilling to assume the responsibility of going forward with arrangements to have the meeting at Oxford and the University. The facts were all submitted to the Executive Committee of the Association and they were asked to say whether we should hold the meeting at

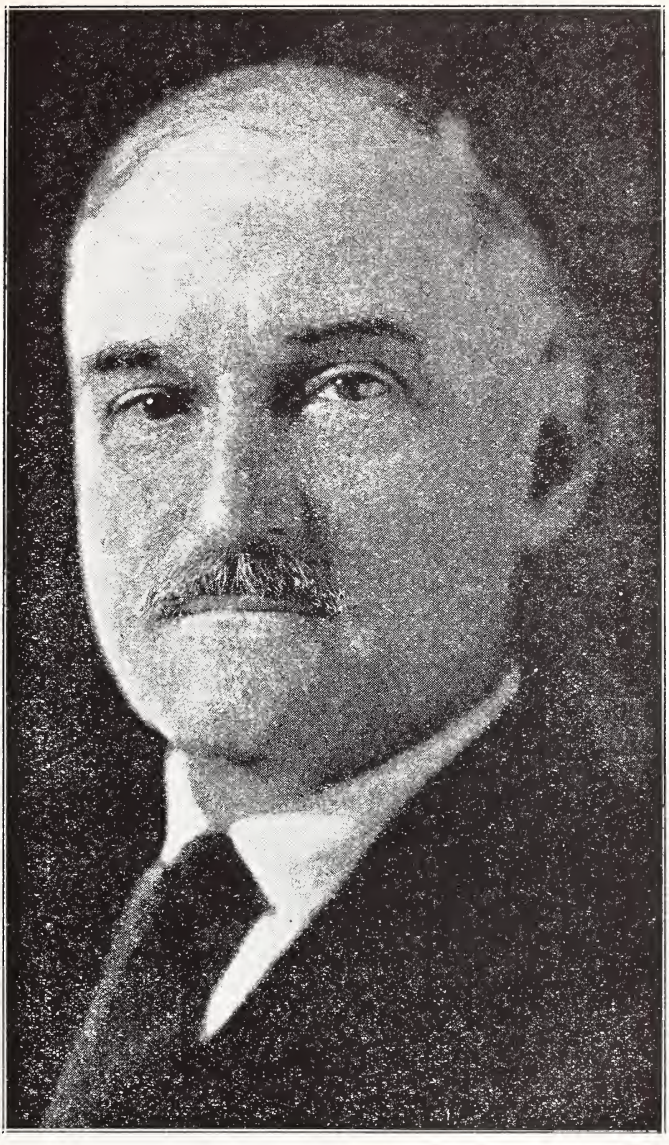
Oxford and the University or go elsewhere. The Committee, upon consideration of the matter, unanimously decided that under all the circumstances it would be wise and best to meet elsewhere. The Association having been invited to hold its meeting at Biloxi, by the Harrison County Bar Association together with many citizens of Biloxi, it was voted to accept this invitation and meet at Biloxi, April 30th, with the Buena Vista Hotel as headquarters.

The necessity for the change has occasioned keen regret and disappointment on the part of the Oxford and University communities who through their live civic organizations and private citizenry have been taking an eager and active interest in making the necessary arrangements to entertain the Association. These splendid communities hope that the next annual meeting of the Association will be held with them when the law building can be appropriately dedicated. It was through the efforts of the State Bar Association that the Legislature was induced to appropriate large funds with which to build a modern law building and properly equip it. It would be peculiarly fitting then that the building be dedicated by the Association.

MEMBERS URGED TO BE PRESENT AT BILOXI

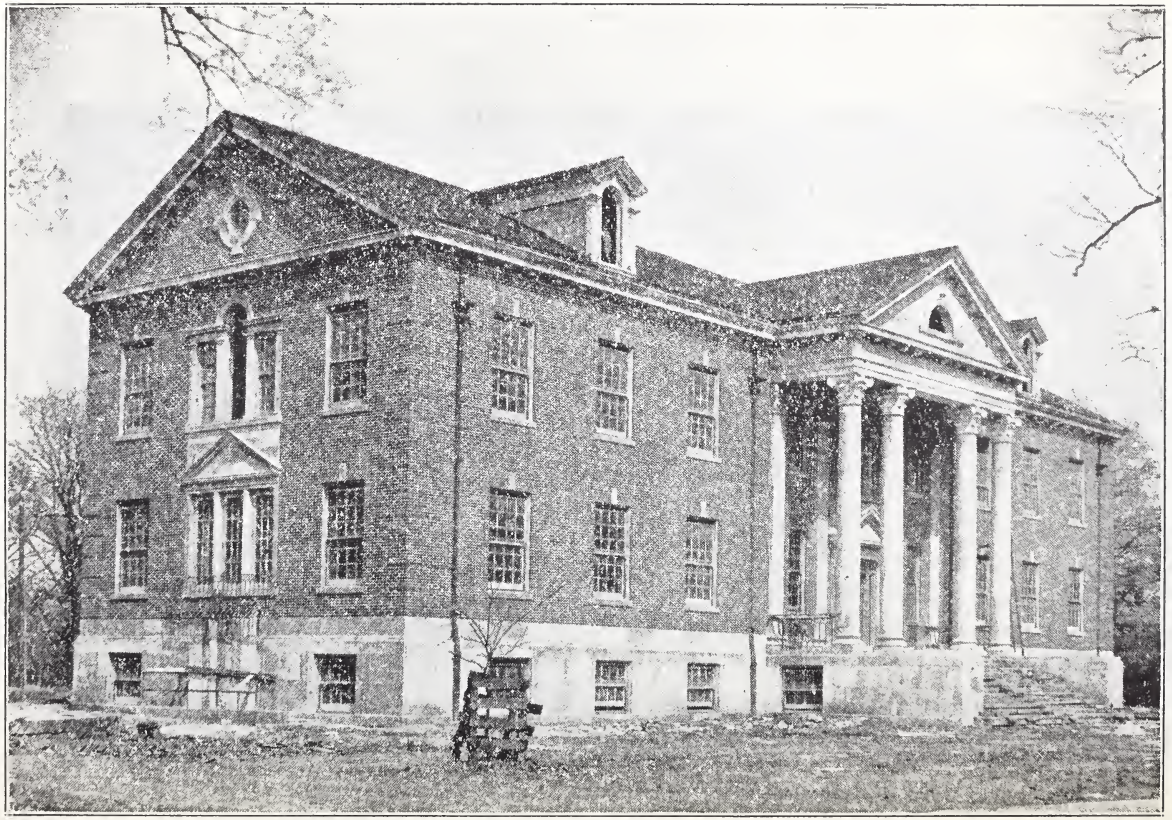
At the Biloxi meeting there will be before the Association for consideration several matters of great importance both to the Association and the Bar of the State. It is therefore necessary and important that every member who is interested in the Association leave no stone unturned in his effort to be present. All committees are earnestly requested to meet in Biloxi on the 29th of April in order that their reports may be placed in the proper form before the Association convenes.

T. C. KIMBROUGH, President,
Mississippi State Bar Association.



HON. HENRY UPSON SIMS

President, American Bar Association, 1929-30. To be the Convention's Honor Guest and Principal Speaker.



LAMAR HALL

The University of Mississippi Law School's New Home.

ON L. Q. C. LAMAR

By Alfred Hume*

The name, Lucius Q. C. Lamar, appears on the first diploma ever issued by the University of Mississippi, as one of the six members of that early faculty. He was then connected with the institution as Adjunct Professor of Mathematics. Mr. Lamar's connection with the University of Mississippi began in 1850. At that time he was a practicing attorney in the town of Oxford, and in July of that year he was elected as Adjunct Professor of Mathematics. He held this position for two years, resigning in 1852, and returned to Georgia. Later he came back to Mississippi, resumed the practice of his profession, and in 1860 he was a member of Congress from the First District. Tiring of public life and the fruitless efforts of Southern Democrats to avert the "inevitable conflict," when in June 1860, he was offered the chair of Ethics and Metaphysics in the University, he accepted it and took up its duties on the opening of the session of 1860-61. In May, 1861, having been elected Lieutenant-Colonel of the Nineteenth Mississippi Regiment, he resigned his professorship for army life in Virginia. In June, 1866, Colonel Lamar was again elected to the chair of Ethics and Metaphysics. He accepted. Owing to the scarcity of funds and the dearth of instructors, he did more than double duty, conducting classes in Psychology, Logic, and in Law. In January, 1867, he was relieved of his work in the College Department and was placed at the head of the Law School. In this school he served until June, 1870, when, owing to the condition of State affairs, he voluntarily resigned. This severed his final connection with the University.

Of him ex-Chancellor Mayes has said: "There was but one voice from those who came in contact with him, in regard to Professor Lamar's efficiency. He was an enthusiast in his calling, whatever that might be; and that enthusiasm he carried into his professional work. As a member of the Faculty he was always wise and prompt in counsel, temperate and considerate, although firm where occasion arose. To his pupils he was always accessible and kind, companionable, inspiring them all with commingled sentiments of profound respect and personal regard. He

* Chancellor of the University of Mississippi.

was devoted to their interests. He felt that, for the time, he was the representative of the true principles of the science which he taught, and that he was individually responsible for the results of his teaching. He possessed in a wonderful degree the faculty of infusing his own spirit into all who sat under his instruction. It was his lot to fill three of the least attractive chairs in the University—Mathematics, Metaphysics, and Law. Yet to each of them he gave a charm in the eyes of his pupils, alike unusual and beneficial. Many of those pupils treasured up his instructions, and bore away with them rich fruits of their association with him; and, in the professional eminence which they attained, proved themselves successful channels for the communication of the same benefits to others."

During the seven years he was connected with the University his influence upon the youth of the State was wide and lasting. Of this, speaking for himself, Bishop Galloway has written: "He was the Gamaliel at whose feet I sat and from whose lips I received instruction. The thrill of that flashing eye, the tone of that magic voice, the strange magnetism of that magnificent presence, filling as it did the broad heaven of our imaginations and the loftiest ideal of my young ambition, have lingered and inspired me for more than half a jubilee of years."

Hon. C. E. Hooker, in a memorial address, spoke these words: "The love and affection which he aroused in the hearts of young men was wonderful. I know of no criticism to which a professor can be subjected more to be dreaded than that of young men assembled from all portions of the State in the classes of a university. You will not find a graduate of that institution who was educated there during the period that Mr. Lamar acted as professor that does not feel for him and has not borne for him in all the changing stages of life that perfect affection and profound admiration that he inspired in the hearts of all young men who came in contact with him."

SHOULD THE COURT OF CHANCERY REMAIN SEPARATE?

By V. A. Griffith*

When any particular governmental scheme has been given a trial in a state and that trial has resulted in a failure, it may be admissible that the advocates of the plan, on the complaint that their preference has not had a fair trial, shall have another opportunity to justify their theory. But when on a second trial of the scheme, there has resulted a like failure this should be an end of the experiment. And this is exactly what has happened in Mississippi in the matter of combining the jurisdiction in law and equity under one court.

Leaving aside the earlier court organizations under the first few years of territorial government, when clumsy and inexpert territorial legislation was groping under primitive conditions in the attempt to devise a judicial establishment that would sufficiently serve the scattered settlements, we find that immediately thereafter and as early as February 10, 1807, the need for a distinct recognition of equity and its principles as a part of our jurisprudence was admitted by the territorial legislature, and it was then enacted that the superior courts "shall have and exercise all the power, authority, and jurisdiction incident to courts of chancery, and may ordain and establish all necessary rules for the orderly conducting of the business in equity." This was further sanctioned and affirmed in 1809 by an act changing the name of the court of general original jurisdiction to that of "superior court of law and equity."

Thus from 1807 down to 1821, as shall next be mentioned, the jurisdiction both in law and in equity was administered in one court under one nisi prius judge solely presiding at a term. What happened thereunder in relation to the success of that combined jurisdiction is expressed in the message of Governor Poindexter to the legislature, then in session at Natchez, on January 20, 1820. He said:

"I also recommend a change in our judicial system by a separation of the chancery from the common law jurisdic-

* Associate Justice of the Supreme Court of Mississippi; former Chancellor of the Eighth Chancery Court District of Mississippi; author of Mississippi Chancery Practice (1925); and member of the Mississippi Code Commission of 1928.

tion of our courts. Experience has shown that a combination of these, in the same Judge, is productive of much embarrassment, and that the labor is greater than can be performed within the limited terms of the superior courts of the several counties. The chancery side of the docket, which certainly requires the most attentive and mature deliberation, is usually taken up after the jurors and witnesses attending on the court are discharged, which compels the presiding judge often to dispense with the arguments of counsel, and to give a hasty opinion on matters of the greatest importance and difficulty. The establishment of a high court of chancery, to be held at one or more places in the State, would contribute in no small degree to a speedy and regular administration of justice and relieve the community from protracted litigation and vexatious delays, which amount almost to a denial of the redress, which they seek through the medium of a court of equity. On this subject, I transmit to you a copy of a communication received from the judges of the supreme court, whose talents and experience entitle their opinions to the most respectful consideration."

The legislature having done nothing, the governor again called the matter to their attention in his message of January 3, 1821, wherein he had to say as follows:

"I cannot omit to repeat the recommendation submitted to your predecessors, that the common law and chancery courts of the State should be separate and distinct. For some of the reasons and facts which show the propriety of such a change in our judiciary, I refer to my message of the 20th of January last, and the document transmitted at the same time. The suggestions made in these papers have been since strengthened by the known inability of the judges to perform the duty imposed on them as chancellors, after having disposed of the causes on the common law dockets, which alone are more than sufficient to occupy the labors of the courts during the limited terms prescribed by law in the several counties. This complex jurisdiction amounts almost to a denial of justice in cases cognizable only in a court of equity; and what is equally to be deprecated, it destroys that uniformity and consistency which ought to characterize the decisions of all courts of justice, and upon which so materially depend the rights of property and the safety of the citizen. The most learned and skilled judge cannot suddenly depart from all the settled rules and maxims of the common law which he is accustomed to consider and observe, and so far change his character as to be gov-

erned solely by the more liberal and enlarged principles of equity; the boldest jurisconsult who ever graced the annals of any country would feel inadequate to a task so difficult and perplexing.

"The remedies pursued and the relief granted in courts of equity are altogether independent of, and inconsistent with, the forms and proceedings in courts of law. Whether, therefore, we regard the speedy administration of justice, or the correct adjudication of cases on fixed and well established principles, by tribunals properly constituted, it is alike incumbent on us to create a court to be vested solely with chancery powers and jurisdiction. For the accommodation of parties litigant, I submit the propriety of designating two convenient places, at which the chancellor shall be directed to hold a court twice in each year."

Again on November 7, 1821, at the opening of the fifth session of the legislature at Columbia, the governor in his message referred to the matter as follows:

"Having on several former occasions, communicated to the general assembly my sentiments on the subject of a severance of the common law and chancery courts, it might be deemed superfluous to recapitulate the reasons on which the adoption of the measure was recommended. Nothing has since occurred to weaken the opinion which I have long entertained, that the uniform, speedy, and impartial administration of justice requires a partition of powers between the courts of equity and the circuit courts of law. A combination of these, in the same judge, is substantially a denial of the remedies which belong, exclusively, to the chancery side of the dockets. Under the present defective organization of our courts, suits in chancery, involving questions of the highest interest, both in reference to principle and the amount in controversy, remain unheard and undecided for a series of years, to the great injury and vexation of the parties litigant. The evil so generally felt and acknowledged, can be corrected only by a transfer of equity jurisdiction to a chancellor, whose mind will be directed to no other object, and who may in a very short time rescue the community from that endless litigation and confusion inseparable from the system now in operation. In recommending to you this essential change in our Courts of Judicature, I am supported by the concurrent opinions of the Judges of the Supreme Court, and the most enlightened and experienced members of the bar, and by the wishes of

the people at large, so far as they have come to my knowledge."

Accordingly there was enacted at that session, and approved on November 27, 1821, the chapter creating the separate superior court of chancery. There were the solemnly repeated declarations of the governor, supported by the universal opinion mentioned in his last message and affirmed by the legislature, that the scheme of combined jurisdiction that had then been definitely in operation for fourteen years had been demonstrated to be a failure,—and that was its first trial.

That it must have been even more of a failure than a casual reading of these messages would disclose is made manifest when we consider the situation that was then present in respect to the difficulties of travel and the inconveniences of attending upon courts at distant points, and when we consider further the strong predilection of our people,—a predilection hereditary through a thousand years,—for local tribunals administering justice within the immediate political community of the residence of the litigants. At the time mentioned in 1821 when it was determined that the separation of the two jurisdictions was imperative, there were less than one hundred thousand inhabitants of all classes in the State, not including Indians living under tribal customs. The amount of the distinct equity business was such that it could then be attended to by one chancellor, provided his time were not too much wasted in the purely physical labor of traveling from county to county. When the change was made it was therefore known that only two or three central points would be possible as the places where the court of chancery would be held, and that solicitors would have to travel long distances to attend the sessions. There were no bridges over the numerous streams, such ferries as existed were of the most primitive kind, and there were practically no improved roads. Travel was in most part on horseback and thirty to fifty miles per day was about all that could be covered. Nevertheless, in the face of all this the change was made.

At first and under the original act two chancery districts were created, the eastern and western, and the two points, Natchez and Columbia, were designated at which to hold the courts. In 1827, four districts were created in the effort to bring the court nearer to the litigants. When the constitutional convention assembled in 1832, the question was fully reviewed and in response to the complaint that the

distances to the places of the chancery court sessions and the inconveniences of travel had made the separate system so burdensome as to overcome its otherwise admitted advantages, the Convention met the complaint so far as it was then deemed admissible by a provision in Sec. 16, Art. IV, Constitution 1832, that "the legislature may give to the Circuit Courts of each county, equity jurisdiction in all cases where the value of the thing, or amount in controversy, does not exceed five hundred dollars; also, in all cases of divorce, and for the foreclosure of mortgages." Succeeding this, various acts were passed providing additional terms of court and additional places for holding them; and in 1842 a northern vice-chancery district was created with terms to be held twice a year at Columbus, Fulton, Holly Springs, and Carrollton. In 1846, a southern vice-chancery district was established with semi-annual terms at Natchez, Monticello, and Mississippi City, and in 1848, a semi-annual term was required to be held also at Paulding, and a like term at Hernando,—these in addition to the terms held by the chancellor at Jackson, at which point the court remained practically in continuous session.

At the time of the creation of the vice-chancery districts and of the addition of several new points for the holding of the session of chancery court, the State had entered upon a steady growth in population and in material prosperity. The Indian title had been extinguished throughout the State and the entire area within its boundary had been organized into counties of convenient size. The progress in the material and commercial concerns of the people had become such that the requirement to seek a forum of original jurisdiction, at distant points, in litigation that more and more affected their daily interests had become too irksome to be longer tolerated. Moreover, it was at this time that a nation wide agitation had arisen for the adoption of codes of procedure, whereby to escape the technicalities of the common law rules. It was being proposed that all forms of action in civil cases be abolished, that the distinction between law and equity be discarded and that all original jurisdiction outside of petty cases be vested in one district court. New York had been a leader in this movement, and in 1848, adopted a complete, although cumbersome, code which embodied the practices and principles just mentioned. Many of the western states, in fact nearly all of them, did likewise. This agitation, and this new prescription for all procedural evils, made its appeal to our own people, and this taken in connection with the aforementioned inconveniences

of distant sessions under poor facilities for transportation, aroused an interest in the united jurisdiction which moved on to action.

In addition, it was the argument that our former experiences with the combined system from 1807 to 1821 had not been under conditions that afforded it a fair trial. It was pointed out that in those days there were not enough judges to do the work well, that a large part of their time had been taken up by the hardships of travel, that there were no comfortable accommodations at the backwoods court houses of that day and no law books available at these points,—all making it impossible for the judges to remain long enough at one place to maturely dispose of all the business and impossible to do it with accuracy because of the absence of books. It was argued that all these adverse conditions had so far improved that another and a fairer trial of the combined jurisdiction would produce results that would be satisfactory, and would justify all that the adherents of the scheme so earnestly maintained in its behalf. Thus on March 2, 1854, the Legislature consented to propose a constitutional amendment, which having been ratified at the polls, was inserted in the Constitution on February 6, 1856, and which provided that "Chancery Courts, with full jurisdiction in all matters of equity, shall be held in each judicial district by the circuit judges thereof at such time and places as may be directed by law."

It was the purpose of this amendment that the legislature should provide that the terms of the chancery court in each county should be held at the same time and concurrently with the terms of the circuit court and this was what was thereupon enacted as the law. And what was the result? Exactly the same that had happened under the former trial of the scheme. What habitually happened was that the equity docket would be set over until all the jury cases, criminal and civil, had been tried, and then when the judge and lawyers were well worn out there would be a gesture towards disposing of the equity docket, and those cases, being of the character which called for the most painstaking study and most discriminating consideration, were either hastily dispatched or were continued to the next term, at which latter the same process would be repeated. And too, it was the experience that by reason of the far larger number of jury cases, criminal and civil ordinarily tried before them, the common law judges became so used to the mental habit of relying almost solely

on the attorneys in the cases for the applicable law, placed by them before the judge in the form of written instructions, and on the jury as to decision upon facts, and their minds, throughout these criminal and law trials, being so largely directed to considerations of general law enforcement and to the mere machinery thereof, it was almost impossible for them in the press of term time to transfer their mental processes from that, where the audience and the juries and all the surroundings of a popular court prevailed, to the dry atmosphere of an equity hearing with all the refined difficulties that such a case usually presents. It was found, while there were some notable exceptions, that it was not possible for most of the judges to make, each at the same time, a good circuit judge and a good chancellor. Either he was throughout a circuit judge approaching the chancery cases with misgivings and confusion on the facts, and with an inferior knowledge and sympathy with the abounding principles of equity, or else he would be a chancellor and in the trial of law and criminal cases would take entire charge of the law and the facts, conducting an equity hearing instead of a trial at law.

These things, and more of the same general character, were soon realized by the bar and by the people. While we have not perhaps so full an authentic official record of it, as we have in the messages of Governor Poindexter touching the first experiment, there are nevertheless many contemporary written sources wherein confirmation of it may be found. Moreover, there are yet a number of lawyers, now grown gray in the service and whose years are past the three score and ten, who remember, and distinctly recall in some detail, what, as young lawyers just coming to the bar, they heard at that time in respect to these matters from those, then old, who had practiced in the courts of this State from 1856 to 1869, and thereafter. It is therefore more than a mere tradition,—it is testimony now brought to us by those who heard it direct from those who knew. And that testimony is that there was no difference of opinion about it, after the plan had prevailed for a sufficient length of time to test it,—and that opinion was that the scheme had again proved a failure.

So it was then, that when the Constitutional Convention of 1869 approached the subject it was determined to restore the court of chancery as a separate court. But it was not only in the matter of equity jurisdiction that this convention had resolved to remedy demonstrated defects

in the then existing system. From territorial days down through the first constitution and until the Constitution of 1832, jurisdiction in that class of business that may be grouped under the general title of probates, had been exercised by special courts of varying personnel and even under varying titles, although for the greater part of the time under the title of "Probate Court." Under Sec. 18, Art. IV, Constitution 1832, it was provided that "A Court of Probates shall be established in each county of this State, with jurisdiction in all matters testamentary and of administration in orphan's business and * * * in cases of idiocy and lunacy, and of persons non compos mentis." The judges of the court of probates were not required to be learned in the law, although a large part of the jurisdiction involved matters and causes that frequently required the most careful and mature legal adjudication. The result was that the administration of these courts, as a general rule, was a bizarre combination of error of law and neglect of fact, with frequent resort to equity by original bill to restrain the proceedings in these probate courts or to withdraw complicated matters therefrom, and the Supreme Appellate Court was filled with appeals from them; and, to such an extent did these evils run that it finally came to be tersely said of probate proceedings that it was seldom a question whether they were valid,—the only question was whether they were void or merely voidable.

Accordingly, the Convention at one stroke not only restored the separate jurisdiction in equity but wiped out the court of probates and to those ends provided, in Sec. 16, Art. VI, Const. 1869, as follows:

"Chancery courts shall be established in each county in the State, with full jurisdiction in all matters in equity, and of divorce and alimony; in matters testamentary, and of administration; in minors' business, * * * and in cases of idiocy, lunacy and persons non compos mentis"; and further provided in the succeeding section, that a chancery court should be held in each county at least four times in each year. There was thus met and accommodated the chief argument that theretofore had been made against the separate court of chancery, namely, that its sessions were not held within convenient reach or within each county. Moreover, its opportunities for an expert and broad administration under chancellors specially trained for the work had been enlarged as stated, so that the jurisdiction had become restored to that nearly as ample as was the

jurisdiction exercised by the High Court of Chancery in England.

But, had the new organization had less of wisdom in its restored framework and less of natural strength fit for its survivorship, it would surely have gone down under the load of embarrassment which was immediately placed upon it. The chancellors were appointive and there was an alien governor in office and the people were being afflicted with all the woes of reconstruction. The partisan governor placed in the chancellor's offices, in most cases, men who were ignorant and unfit, some of them scarcely knowing the difference between a demurrer and a deposition. However, the storm was ridden and when the light of the morning of a decent and intelligent government arose, the chancellorships were thereupon filled with learned and upright judges, and from then until the coming on of the Constitutional Convention of 1890 there was a period of about fourteen years in which the merits of the time tried system was again satisfactorily proved.

Nevertheless, when the Convention of 1890 assembled and a re-examination of this subject was begun, it was found that about one-third the members were in favor of returning, for a third trial, to the combined system of law and equity. The chief argument then made and earnestly pressed was that so vigorously stated by Justice Campbell in *Hoff vs. Rogers,* 67 Miss. at p. 212, that is, that often after long and expensive litigation a decree or judgment would be reversed on appeal, not because the right result had not been reached in the trial court, but because the case had been instituted and tried in the wrong court. To meet this argument, the master minds of that convention brought forth Sec. 147, Const. 1890, which provides that "no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction"; and with this inserted, the Constitution of 1890 preserved the court as it was ordained under the Constitution of 1869, and so it stands to this day, having now to its credit one-half a century of uninterrupted and undisturbed existence.

But as the minority advocates of the combined plan pass into the beyond, others rise to take their places, and the proposition is from time to time again brought forward for consideration. All the principal of the former time-worn

arguments have been fully met by the wise arrangements of our present constitution, but now new reasons, or reasons partly new, are advanced and some of them are these:

1. The federal courts follow the plan of a combined jurisdiction as do forty-three of the states, leaving only New Jersey, Delaware, Arkansas, Tennessee, and Mississippi with the separate system; and in consequence there is an overwhelming weight of nation-wide opinion against separation.

2. The rules of jurisprudence applied and enforced in equity have their force and existence out of the same sovereignty as the rules of the common law and bear equally on all alike, so that there is no reason other than an arbitrary or technical one for considering them as separate or for their separate administration. In other words, that there should be a blending both in substance and in procedure.

3. But even if the rules, both as to substance and procedure, were retained as at present, an improved administration would result in that the trial judge by the adjudication of both systems would learn to apply a refining process upon the law by its close consideration along with equity, and vice versa.

4. If the courts were combined, additional terms could, with the same number of nisi prius judges, be held in each county, and thereby furnish a more prompt dispatch of pending cases.

Before looking back over the four propositions just stated, and approaching an answer to them, there is a preliminary question which, as applied to our chancery courts, must be answered, and that question is, if law and chancery are to be combined, what is to be done with the probate jurisdiction? Are probate courts to be re-established in each county? By every person who has familiarized himself with the legal and judicial history of this State, that question will be answered most assuredly in the negative. We must assume therefore that the jurisdiction, if combined with the courts of law, will carry over into that jurisdiction also the full jurisdiction in probates. When it is considered that twice in our State, the experiment to carry over only equity resulted in failure, how can we consider that in any event it can now succeed when it must carry over not only equity but also all the jurisdiction in probates?

And this brings us directly to the first proposition above stated. In most, if not nearly all, the forty-three states

having the combined administration of law and equity, there are probate courts, although not always called by that name. It has already been mentioned also that in most of them there is a code of practice. By these codes the common law and equity procedure was sought to be simplified to the farthest extent deemed practicable; as a part of which all forms of action were in general abolished and every case is presented by petition and defended by an answer, or reply as it is sometimes called. But experience has demonstrated that these codes of practice have fallen far short of producing the results anticipated. In seeking to avoid the procedural questions arising out of the modified common law methods of procedure, such as we have in our State, these procedural codes have succeeded only in raising a new crop of questions even more prolific than those that arise in the states that adhered to time tried methods. This is sufficient to admonish us against following in the lead of those states in procedural matters. In most of these states, and, of course, in the federal courts, the judges charge the juries orally and are thereby trained to a strictly close analysis of each case both on the law and the facts, and to a succinct and accurate statement thereof in these charges. This duty closely approaches the analysis and decision of each case by the chancellor. If the time shall come when the rule of procedure, so long adhered to in this State in respect to charges by the judge to the jury, shall be changed, then the argument for the combined jurisdiction will through this feature gain some strength; but so long as common law judges can neither charge orally, nor volunteer an instruction, nor comment on the testimony, the decision of cases, upon both the law and the facts, does not belong to the training of a circuit judge, and indeed the question is worthy of consideration whether the duties of the combined jurisdiction would not the more likely train him away from those principles of personal administration which must characterize the conduct of a circuit judge, under the law procedure in this State. Circuit judges exercise duties in the enforcement of law which partake somewhat of the nature of an executive,—duties that well performed are of vital importance along those lines to the welfare of the State. The chancellor, on the other hand, is strictly a judicial officer. Again, in the states which have the combined jurisdiction under codes, which attempt to abolish all procedural distinctions, what has been the tendency where there are several judges of the same grade in one county sitting in the same courthouse? This should

furnish a most convincing object lesson. In a city of one hundred and fifty thousand inhabitants in a western state, the writer had occasion, while there a few years ago on legal business, to observe this very tendency. There were seven district judges, all having exactly the same jurisdiction, and this of law, both criminal and civil, and of that which formerly was equity. Their district consisted of the one county in which the city mentioned was situated. The clerk assigned the cases, and for years the practice had been to assign all the criminal cases to two of the judges, all the law civil cases to three others of them, and to the remaining two of the said seven judges all those wherein the application of the original principles of equity would be involved. Thus two of the judges habitually sat as chancellors, while the law cases went exclusively to the other five,—not as a matter of legal jurisdiction, but as a matter of practice and in fulfillment of a tendency as natural as are the operations of the normal rules of mental philosophy and instinctive common sense.

There is thus furnished a practical, a demonstrative, answer to the proposition that contends for a complete blending of law and equity both in substance and in procedure. To that answer, there must be added that the stated proposition is a theory impossible of practicable accomplishment, unless all our books of law, except those of the Roman civil law and its derivatives, were burned so that not one should be left, and all our learning gained from them were cast wholly out of memory and we should start all over again, without previous impressions, to rebuild our whole legal structure anew. And even our constitutions and statutes would have to go overboard in such an undertaking. What an absurd conception, and yet it is a necessary predicate to the proposition advanced under this head. Moreover, if we were to forget all our law and our constitutions, we should still want in any event and at all hazards to retain and keep in force that one feature which has distinguished our system of government in this country above all others and has made it the model to be followed in large measure at every advance in constitutional liberty throughout the world,—and that is our arrangement of balances and checks, one department, or division of authority, upon and against another. And in the same manner toward better service and happier results that a senate and a house of representatives co-operate in the enactment of laws, so the court of law and that of chancery in the in-

terpretation and administration thereof; and as the members of the national house of representatives, for instance, bring to bear the immediate thought and sentiment of the people in the various smaller districts, and the senators as the ambassadors of the states represent the state-wide and the national rather than the local viewpoint, so the court of law through its juries and its intimate contact with the body of the people brings to bear upon the spirit of the law that refreshing, revitalizing and slightly varying sentiment which comes direct from the people of the several communities of the state, while the court of chancery, representative of the conscience of the entire state and without thought properly of personal contact, applies the broad principles of state wide legal and equitable sentiment. These and the like are broad considerations for which there is not space here for more than an introduction; indeed, an introduction of them only is all that is necessary to the thoughtful student of government and of laws, for the manifold applications of the thought will readily occur in any sustained meditation upon the subject.

It is not desirable therefore, as it is sincerely submitted, that there shall be such an influence of law upon equity or vice versa that the one shall fuse into the other,—that they become wholly blended and commixed, as is proposed as an object to be attained under the second proposition above stated,—no more so than it would be desirable to unite into one body the senate and the house, or to do away with the various other balances and counterbalances found in our republican form of government. On the other hand, it is, of course, not desirable that the system of law and that of equity shall become inconsistent with, or repulsive to, each other. But the proper manner to hold this possibility in check and to preserve the necessary harmony and consistency is by the very means we have adequately provided to that end, namely, by means of one supreme court, exercising only an appellate jurisdiction and wherein the law shall be declared for all the courts of the State upon finished records of trials, upon sustained deliberation and research, and upon the fullest opportunity for mature and consistent conclusion.

There is finally the fourth proposition above stated, and in this proposition there is carried some apparent weight of argument, as it must be at once conceded. But if the question be only that more terms are needed, then the manifest reply to that is to furnish more judges,—not to destroy

a time tried system to save a few dollars in salaries. But at this time more judges are not, in fact, needed. Three judges can be taken from the circuit district by reducing these districts to fourteen, and three chancery districts added in their stead, and every county in the State could then have at least three terms per year, each of circuit and chancery courts. The fact is already, that the larger counties of the State, wherein the greater volume of litigation arises, have each as a rule more than two terms a year both of circuit and chancery courts. For instance, the county of Harrison, which has the largest chancery docket in the State, has four regular terms of chancery court per year, and the other large chancery counties from three to four terms per year. In a dozen of the larger counties, the county courts with monthly sessions are clearing the smaller business.

Let us see also just what has happened and is happening in the smaller counties when more than two terms of circuit court are now provided by law. There is, for instance, one circuit court district in the State wherein the court calendar, fixed by legislative act, provides three terms annually in each of four of the five counties of the district. But are these three terms held? The record of the past four or five years will show that with few exceptions only two terms a year are held in each of these four counties and the third is pretermitted; indeed, it often happens that in this very district only one term is held in a county, and this because the officers at the instance of the people, particularly the farmers, petition that the other terms be not held. Would this be different if the circuit court had jurisdiction also in chancery? Certainly not. Two terms a year, and sometimes only one, would still be all that would be held. And thus again it happens that theory and argument do not measure out in terms of actual experience and practical test.

For economy of operation, no efficient courts yet devised in any state have outranked our chancery courts in Mississippi. It can be safely asserted that the total expenses to the public treasuries, state and county, including fixed salaries, for the operation of chancery courts do not exceed on the average forty-five dollars per day for every day the chancery court is in session, whereas the expenses to these treasuries of a circuit court are from two hundred to four hundred dollars per day. The modified and simplified rules of procedure in our chancery courts have now reached that point in ultimate development that an industri-

ous and capable chancellor can, in a given length of time, dispatch a larger volume of business, with due consideration and accurate decision, than heretofore it had ever been thought possible to accomplish in any important court of original general jurisdiction. It is true that now and then there is a district where the court is almost a failure, but this is the man and not the system that is at fault. It is to the majority, or at least to the average, that we must look, and when that is done, and when compared under intimate knowledge with other systems elsewhere, our court of chancery as it now exists justifies itself in every essential particular.

It may therefore be confidently predicted that the present generation will see no change in our constitutional structure in reference to the maintenance of the separate court of chancery. And if those who determine and control in future years, will occasionally turn back through the pages of our legal and judicial history, no change will be likely to come within many succeeding generations.

MISSISSIPPI'S PRIMA FACIE STATUTE

By W. W. Venable*

"**Injury to persons or property by railroads, prima facie evidence of want of skill.**—In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employees of railroad corporations and of such other corporations, companies, partnerships and individuals." (Laws 1912, ch. 215. In effect March 6, 1912.) (Section 1717, Hemingway's Mississippi Code of 1927; Section 1645, Code of 1917; Section 1985, Code of 1906.)

In an unguarded moment I promised to write an article on some subject for this Journal.

I approach the task with great diffidence, both because of a due appreciation of my limitations and also because being busy in the practice, I have had little time for the thorough study and mature consideration that should be brought to such a task.

I have chosen this statute for comment both because it is one constantly invoked in practice, and also because, with the possible exception of our so-called two donee statute, there is none in our Code which has caused more reversals.

From a reading of the cases, it is evident that there is confusion of thought at the Bar relative to its meaning and effect. Both in opinions and briefs certain fundamental ideas recur, at least in the language used, carrying certain implications which confuse. I may not be able to clarify, but if not, I will, I fear, at least sustain the statement that there is confusion of thought at the Bar.

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A review of all the cases is not possible in the permissible length of this article and no such task will be undertaken, so only certain illustrative cases will be commented upon.

Several questions arise and have arisen upon an analysis of the statute:

1. Was it the purpose of the Legislature to cast upon the defendant the burden of persuading the jury of its non negligence when the plaintiff has made the preliminary proof of injury by the running of the engine, etc., so that if the defendant did not so establish the fact to the satisfaction of the jury, it would be authorized to return a verdict for the plaintiff?

2. Or did the Legislature intend simply to create a legal presumption, in the strict sense, creating simply the duty of going forward with the evidence without reference to changing the burden of persuasion from the plaintiff to the defendant?

3. Did the Legislature intend to give, by legislative fiat, probative value for jury purposes of persuasion, to proof of injury by the running of the train, so as to authorize the jury to take the presumption into consideration in weighing the evidence?

4. If so, is not such a construction a denial of due process of law?

5. Should an instruction based on the statute be given to the jury on behalf of the plaintiff under any circumstances, and if so, under what conditions?

6. When the defendant, after proof of injury by running of the train, goes forward with the proof is not its full duty done, or is the jury to be instructed to apply the statute and find for the plaintiff because it does not believe the testimony offered by the defendant?

The last two questions are involved in the others, but are asked for convenience of treatment under the decisions.

As pointed out by Dean Wigmore in his work on "Evidence," Second Edition, Section 2483 et seq., the term "burden of proof" is frequently used in two senses; one in which it is used in the sense of having the risk of jury persuasion, which task is apportioned between the opposing parties by the substantive law and the law of pleading and procedure, as where, for illustration, it would be held that in a suit on a promissory note, proved to have been executed and delivered to plaintiff, the burden would be on defendant to establish a plea of payment by a pre-

ponderance of the evidence in order to defeat the action. In this sense the term is used as denoting what propositions are apportioned to the several parties to establish to the satisfaction of the jury, the failure to meet the burden of persuasion being that the jury will decide against the party having the risk.

Since the judge under our system is held to the duty of keeping the jury within the bounds of rational action, the one offering evidence, before he can have the evidentiary material submitted to the jury to be valued by them, must first satisfy the judge that the quantity of evidentiary material is sufficient for a basis of rational decision by the jury.

When ever enough evidentiary material in respect to an issue of fact in the case is offered so that the judge will say that reasonable men could, or might deduce therefrom that the fact sought to be proven was proven, or that the issuable fact could be considered so in the absence of countervailing evidence, it is said that the offered evidence raises a "presumption" or makes a "prima facie case" and the judge admits it to the consideration of the jury as forming a reasonable basis for a verdict in the absence of opposing evidence. If the opponent introduces no evidence to the contrary, the judge gives a judgment against the one failing to produce contrary evidence. The material question is why this is done. Is it done because the facts introduced in evidence prove the fact in issue, or because the facts in evidence impose a burden on the opponent to go forward with proof in denial or avoidance of the facts so proven?

The correct ground seems to be the last. The judge gives a ruling against the one failing or refusing to go forward with the evidence because of such failure. In short, it is said that the proof held sufficient to be considered by the jury raises a presumption which imposes a legal duty on the opponent of going forward with the proof, in default of which judgment is rendered against him for failure to perform this duty.

The fact that the facts raising a presumption tend to prove the presumed conclusion, but this is a reason why the duty of going forward with the evidence is cast on the other side. The duty is one thing, and the probative quality of the facts is another, as shown by the fact that a duty of going forward with proof may be created, at least in part, on general considerations of fairness as that the evidence is peculiarly in the control of the litigant upon whom the burden is cast.

The significant thing is that this is a ruling by the judge as a matter of law, and not on the basis of an inference of fact drawn by the judge from the facts proven to the existence of the facts to be proven under the issues in the case.

Suppose that the opponent goes forward with his proof in oppositon to the proof offered by the other party, then he likewise must produce sufficient evidence so that the judge in his supervisory capacity over the jury can say that it is sufficient to be considered by the jury in opposition or denial of the facts already introduced and making a prima facie case, or as sustaining some proposition in confession or denial. If he does not introduce such a sufficient quantity of evidence, the court will yet hold that he has not met his duty of going forward with the evidence, even though he has introduced some.

But suppose that he has introduced sufficient evidence in the opinion of the judge. Then the situation is this. Each side has introduced evidence sufficient in quantity, as to their respective contentions, to make the conclusions of the jury based thereon rational and not fanciful. Both sides are on an equality in so far as the judge has held that each alike has produced enough evidence pertinent to their contentions that the action of the jury based thereon in drawing conclusions and arriving at the truth of the facts would be a rational process in that there was enough evidence before the jury for rational, and not fanciful, determination of the facts.

This process by which it is held that by rule of law that proof of certain facts throw the burden of going forward with evidence in opposition is called a presumption; that is, that proof of a certain quantity of particular facts relative to the issue, or some fact in issue, raises the duty on behalf of the opponent to go forward with evidence.

In this second sense it is obvious that the process is concerned wholly with the judge, and is a ruling of law, and has nothing to do with the jury. When the judge has ruled that both sides have introduced enough evidence to have it submitted to the jury both sides are on a parity, the purpose of the ruling is to the end that the quantity of evidence shall be sufficient for rational action by the jury, and when the court has ruled that the evidence is sufficient it goes to the jury for this rational determination of the issues of fact from the evidence before it.

Mr. Wigmore states the rule as follows:

"If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence) the presumption disappears as a rule of law and the case is in the jury's hands free from any rule."

Wigmore Evidence, Second Edition, Section 2491.
See also cases cited therein.
He further says therein:

"It is a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, etc."

The Supreme Court of the United States has this statute under review in the case of *Railroad Company vs. Turnipseed,* 219 U. S. 35, decided in December, 1910.

The statute was attacked on the ground that it was unconstitutional in that it placed the railroad in a class by itself and deprived it of the general rule applicable to others that one suing in tort must establish not only the injury, but also that the injury was the result of some negligence in respect of a duty owed to plaintiff. In other words, that the preliminary proof of injury by the running of trains shifted the burden of proof to defendant to prove non negligence to the satisfaction of the jury.

The Supreme Court sustained the statute on the ground that "the only legal effect of this inference is to cast upon the railroad company the duty of producing *some* evidence to the contrary. When that is done the inference is at an end and the question of negligence is one for the jury upon all of the evidence."

This would seem to be a clear holding that the statute creates a strict legal presumption according to the second sense in which the term is used.

Our own court, in its earlier decisions, seems to have been of the opinion that the statute shifted the burden of proof in the first sense; that its effect was to cast upon the defendant the burden of establishing non negligence to the satisfaction of the jury.

The earlier cases abound in expressions that the statute devolves upon the railroad company the duty to show the facts and exculpate itself.

Hamilton's case, 62 M. 503.

Mule killed by railroad. Facts as to how mule was killed not shown. Plaintiff obtained an instruction that if the

mule was killed by the running of the train the jury must find for the plaintiff, unless the defendant has proved to the satisfaction of the jury that the killing could have been avoided by the exercise of reasonable care. True, in this case the court might have held that the court below should have given the plaintiff a peremptory instruction because of the failure of defendant to produce proof, but the instruction for plaintiff was complained of and the court said that the statute devolves on the railroad company . . . to exculpate itself from blame by showing that the circumstances under which the injury was done were such as to free it from liability.

Doggett's case, 67 M. 250.

In this case an instruction was granted the plaintiff in the language of the statute, to which was added the statement *that if the evidence as to care or lack of it was equally balanced the law was for plaintiff and the jury should so find.* (Italics ours.)

In the following cases it is announced that the statute devolves upon the defendant to exculpate itself by establishing to the satisfaction of the jury such circumstances of excuse as would relieve it of liability.

Brook's case, 85 M. 269.

Landrum's case, 89 M. 399.

Easley's case, 96 M. 396.

Hunnicutt's case, 98 M. 272.

Fuller's case, 100 M.

Cole's case, 101 M. 173.

It seems reasonably clear that there is a vast difference between holding the statute to mean that it imposes the burden on the defendant of introducing a rational amount of evidence, negativing negligence, after which the case is to be decided by the jury, on the evidence alone without the aid of any presumption, and saying, as do the foregoing cases, that it devolves on the defendant the duty of exculpating itself by establishing *to the satisfaction of the jury* such circumstances of excuse as would relieve it of liability. Clearly this is throwing on the defendant the burden of persuading the jury that it was non negligent.

Our court in Daniell's case, 108 M. 358, reversed the case because an instruction was given almost in the literal language of the opinions in the foregoing decisions, particularly the Brooks case. It pointed out that in these cases the court was setting forth what the evidence must disclose

before the court could say, as a matter of law, that the presumption of negligence created by the statute had been overcome, so that nothing remained to be passed upon by the jury.

It is submitted that this hardly explains the language of the court. It may be true that this was the occasion of the court construing the statute to determine its legal effect, but the fact remains that as construed it was held to mean that the burden was thrown on the defendant by the statute to persuade the jury of its non negligence. The statute can't mean one thing when the court is passing on the propriety of a peremptory instruction, and another when the case is sent to the jury.

The right results may have been reached in these cases on other grounds. Space will not permit the discussion of this, but it would have been better, in the opinion of the writer, to overrule these cases in so far as they conflict on this question with the holdings of later ones, rather than to undertake to distinguish or reconcile them. It appears constantly in our reports that lawyers are misled by them to the reversal of their cases, and loss to their clients.

Our later cases seem to adopt a position not perfectly consistent with either meaning of "burden of proof" or presumption, or prima facie proof, whichever term we desire to use.

Thornhill's case, 106 M. 387.

In this case our court undertook the review of the principal cases, and to deduce from them the rules therein decided. The court proceeded upon the idea, or at least without comment to the contrary, that the prior decisions were consistent in theory with themselves.

As far as the point now under discussion is concerned, the court announced:

"When the facts and circumstances under which the injury was inflicted have been ascertained, the presumption of negligence created by the statute disappears and the defendant's negligence vel non must then be determined alone from such facts and circumstances."

Thornhill's case has not been modified, but has been constantly approved in later decisions.

In Daniell's case, 108 M. 358, the court instructed the jury in accordance with the language of the opinion in the Brook's case, supra, and our court in its opinion reversed the case for the granting of such an instruction, and in its

opinion said that when the facts have been ascertained the jury must be able to say therefrom that the defendant was guilty of negligence, otherwise he cannot be held.

The following cases announce the same rule:

Davis vs. Temple, 129 M. 6.

Hines vs. McCullers, 121 M. 666.

Gulf M. & N. Ry. vs. Brown, 138 M. 39.

Railroad Company vs. Gray, 118 M. 612.

It will be noted that in the Thornhill case the court laid down the rule that when the facts and circumstances had been *ascertained* the presumption of negligence from injury by the running of trains ceased to operate. In further elucidation of what was meant, the court said:

"Whereas in the case at bar, there is a **dispute** as to the facts and circumstances under which the injury was inflicted, it cannot be said that they are known in the legal sense until they have been found by the jury, and if the jury is unable for any reason, to determine what the facts and circumstances are, they never, in a legal sense, became known, and consequently in such a case the inference of negligence drawn from the infliction of the injury remains in effect and determines the defendant's liability."

In Daniell's case, supra, the same doctrine was announced.

See also Hudson's case, 142 M. 542.

Lee's case, 149 M. 543.

Fondren's case, 154 M. 40.

In this last case the court approved an instruction that if there was such a conflict of facts and theories between the testimony of plaintiff and the testimony of the defendant as to prevent the jury from being able to determine how the injury was inflicted, then it might apply the inference of negligence against the railroad company.

It would appear from the holding in these cases that our court holds that while the statute does not impose upon the defendant the duty of persuading the jury of its non negligence from the facts, yet the facts are not shown unless and until the jury is persuaded that the defendant's witnesses are telling the truth.

In Thornhill's case both sides introduced eye witnesses to the injury. According to the witnesses of plaintiff he was injured while standing on defendant's railroad track at its intersection with a street in the city of Jackson, watching a baseball game, when one of defendant's trains, with-

out warning of whistle or bell, ran over him, approaching him from the rear. According to eye witnesses for defendant, he was injured without fault of the defendant, while attempting to jump on one of defendant's moving trains.

It will be noticed that in this case the plaintiff did not rely alone on making proof of injury by the running of the train, but proceeded to develop the facts according to his theory. It will be further noticed that the defendant went forward with the proof to such a degree that the trial court thought it made a case for the jury. The plaintiff asked for, and obtained, a prima facie instruction, which it was contended on appeal should not have been granted, since the defendant had gone forward with its proof, the facts were in evidence, and there was no room for presumptions. The court rejected this contention, and necessarily in so doing held that our prima facie statute did something more than create a duty to go forward with the proof to the extent of satisfying the judge that there was a sufficient body of evidence to be submitted to the jury as a basis for rational decision. It held that because the evidence was conflicting the *jury* might use the presumption upon which to found a verdict, if, for any reason they could not determine what the facts were. In short, the presumption was given to the jury as a possible element in a factual decision.

The same thing was done in Fondren's case, supra, except even more so.

It is clear that such a rule is not according to the rule of presumptions, which has to do solely and alone with a ruling by the judge that sufficient evidence has been introduced to take the case to the jury for decision. According to the rule thus announced, the defendant must not only produce evidence sufficient to satisfy the judge that there is enough evidence to furnish the jury with basis for rational decision on the issues, but in effect it holds that the defendant is to be held liable by virtue of the presumption, if the jury cannot determine how the injury occurred.

In the Thornhill case, as in the Fondren case, each side had witnesses who gave their account as to how the injury happened, and as to all the surrounding facts and circumstances. The court necessarily held that the evidence for defendant was sufficient in quantity, and sufficiently responsive to the issues of fact, as to furnish a basis for rational decision by the jury. If then there was sufficient evidence before the jury to furnish the basis for rational decision (and if the defendant had not produced enough,

the court should have given a peremptory instruction for the plaintiff) how is it conceivably possible for the jury to be unable to determine from the evidence, without the aid of presumption, what its decision should be? If defendant had not introduced enough evidence to make a case for the jury, the plaintiff was entitled to a directed verdict. The fact that the case was sent to the jury by the judge is conclusive that he held that there was enough evidence to furnish the basis for rational decision by the jury.

How, then, can there be need of a presumption, under such conditions, as an aid to the jury in deciding facts?

It would appear that to hold that the statute does not impose the duty on defendant to prove non negligence, and at the same time to hold that even though evidence is introduced by him on every issue of fact, the presumption of negligence operates unless he persuades the jury that his witnesses are telling the truth is a contradiction.

A possible reply is that when the jury decides not to accept the testimony of defendant's witnesses, they can necessarily decide that the defendant has not gone forward with the proof, and the defendant not having performed its duty the statute imposes liability.

The answer would seem to be that under the law of presumptions the duty of deciding whether or not the burden of going forward with the proof has been met is a duty for the court, and not factual material for the jury.

Hamlin's case, 72 M. 39.

Wherein it was held that if the evidence relative to the facts and circumstances of the injury is in conflict, the jury should be instructed to determine the question of negligence from the testimony alone without aid from the statutory presumption, was expressly overruled in Thornhill's case, supra, thus reinforcing the holding that the jury might use the presumption in deciding facts though evidence was in.

This brings us to the consideration of reasons for the necessity of answering our first question in the negative and the soundness of the holding that even though the evidence is in, if it be conflicting, the jury should be instructed on the prima facie statute, that they might use it in reaching a decision under stated circumstances.

Our court has held, and now holds, that even though all the facts are in evidence, it is proper to charge the jury that the proof of injury by the running of trains, etc., is

prima facie evidence of negligence, or the lack of due care and skill.

Phillip's Case, 64 M. 693.

Murray's Case, 91 M. 548.

Lee's Case, 149 M. 543.

Fondren's Case, 154 M 40 (The last published volume of official reports).

True, it is held that if the facts be in evidence it is proper at the same time to charge that the jury must decide the question from the facts, *but this is placed on the ground that the evidentiary power given by statute to the proof of injury by the running* of the trains is not needed.

Phillip's case, supra, and cases following it.

That the so-called presumption has evidentiary value is shown by the cases cited supra, wherein the court holds that the jury may use it in deciding where there is conflict of testimony, even though all the facts are in evidence as to how the injury occurred. The jury is, in effect, held proper to be told that if the evidence is so evenly balanced as to weight and credibility that they are undecided which account to believe, that they may use the so-called presumption as deciding the question. Clearly this is a holding that under certain circumstances the burden of proving non negligence to the satisfaction of the jury is shifted by the statute under certain circumstances, or at least that the presumption has evidentiary value enough to tip the scales.

The present holdings of our court may be summarized:

1. That even though the defendant, after preliminary proof of injury by the running of the trains, etc., may produce evidence showing the facts and circumstances of the accident, it is still proper to instruct the jury on the prima facie statute.

2. That where the evidence is conflicting, though if one side or the other be believed, all facts are in evidence, it is proper to give the instruction.

3. That the production of proof as to the facts and circumstances by defendant is not enough, but that the statute does not cease to operate as a direction for the jury to find for the plaintiff until the jury has decided what the facts are, and only then are they to decide the question of negligence or non negligence alone from the facts so established by them without aid from the presumption. It seems reasonably clear that to render these holdings consistent it

must be considered that our court proceeds upon the following construction of the statute:

1. That the statute gives evidentiary factual value for jury purposes to the fact of injury from the running of trains, etc.

2. That this being true the jury can always be told that proof of these facts have this effect and value.

3. That the holding of the court that when the facts and circumstances can be, or are settled in the minds of the jury they should not consider proof of injury, etc., as having any evidential value for purposes of decision, is on the ground that it is not needed; i. e. the facts being decided, or being capable of being decided, the presumption is not needed in their decision.

4. That while the evidentiary value given by the statute to proof of injury by the running of the trains, etc., cannot be used to determine negligence, the facts and circumstances accompanying the injury having been determined, and this aid being no longer needed, yet where the testimony is conflicting as to what the facts and circumstances are, the jury may make use of it in resolving any doubts.

Where the testimony is conflicting, even if all the facts and circumstances are testified to, yet if in determining what witness to believe a juryman is doubtful, he is justified in adding the legal fiat evidentiary value given to the proof of injury by running of a train, etc., to the testimony, and thus tip the scales.

It seems clear, however, that this is giving the fact of proof of injury from the running of the trains, etc., evidentiary value for jury purposes, instead of creating a pure, legal presumption whose only function is to throw upon the defendant the duty of going forward with the proof. Juries have nothing to do with such presumptions, and when enough testimony is produced, and the case is sent to the jury, it goes there for the evidence to be valued by the jury according to its inherent probative value and worth.

Suppose it is answered, however, that the jury is given the prima facie instruction because the statute imposes the duty on the defendant to produce evidence as to the facts and circumstances of the accident, and that this is not performed if these are left in doubt and conjecture, and that the jury is simply told that if such is the state of their minds, then the defendant has not done his duty in going forward with the proof sufficiently, and therefore the jury

so finds, and having so found and thus settled the default of the defendant, the court tells them to find for the plaintiff as matter of law.

It seems to the writer that the answer to this possible contention is that when the court permits the case to go to the jury for decision, and grants neither side a peremptory instruction, the court has in effect already ruled that there was a sufficient body of evidence to make a case to be passed upon by the jury, and to furnish a legally sufficient basis for a rational verdict and finding of fact based on the testimony so submitted.

If the defendant has not introduced such a body of proof, the plaintiff should receive a peremptory verdict and judgment.

Whether or not a prima facie case, or defense, has been established is a question of law for the court, and not a question for the jury.

Courts do not give instructions on presumptions, as a general rule. True, where the fact giving rise to the presumption is disputed the existence of this fact is submitted to the determination of the jury, but the court charges the jury, as matter of law, that if this fact is established, the other fact of which it is presumptive, must be taken as true as matter of law.

The cases mentioned in this article are not ones where the fact giving rise to the presumption is in dispute, namely, whether or not one was injured by the running of a train, but cases wherein this fact was admitted or indisputably proven.

It may be further said that the statute presumes negligence or the lack of due care and skill, that the duty is thrown upon the defendant to go forward with the proof as to every possible fact which could reasonably have existed, showing negligence or due care, and that since the statute thus relates to every possible fact that could have existed, it is left to the jury to say if testimony as to all these facts has been produced.

Again, it would seem that the answer is that the court is able to say whether there is testimony as to such facts, and should give a peremptory instruction if there is not such a body of evidence produced by the defendant.

But it is said that the statute raises the duty to show how the accident occurred, and if the jury is in doubt, even though the testimony is produced, then the defendant has

not shown the facts beyond conjecture, and the jury should be instructed so that in such a situation they should know that the statute then gives the verdict to plaintiff.

This makes the defendant produce not only the evidence, but also conviction.

If the court has said, by sending the case to the jury, that there is a sufficient body of evidence to form the basis for rational finding, why should the jury be permitted to refuse to found its verdict on the testimony and resort to a legislative presumption which the court has held as effect is not needed.

If it be true that our decisions proceed on the fundamental assumption that the statute gives probative value for jury purposes to proof of injury by the running of trains, etc., and that they may always be so instructed, but with the additional instruction that if the facts are established, or when they are established, in the minds of the jury, the jury is not permitted to reach the conclusion of negligence from the assumption of the statute, but from the evidence, the assumption not being needed, and the duty being to decide facts when it can, and not shift its duty by letting a presumption do their work, the question remains whether such a construction is permissible.

It will be noted that by the statute proof of injury by the running of trains, etc., is made prima facie evidence of the lack of due care. A moment's thought will disclose that as a matter of inherent, probative quality the happening of injury by the running of a train is as consistent with care as it is with the lack of it. Something which is not inherently probative of negligence is declared to be such by legislative fiat.

So long as the statute is held to mean that it merely controls who shall go forward with the proof, and when the defendant is denied no substantial right because he has a fair opportunity of getting his proof before the jury and having them decide on the evidence according to its inherent probative and persuasive quality, no substantial right is denied. When, however, by legislative fiat, something is made to have probative effect when it does not inherently have it, and the jury is authorized to act on it, giving it effect as evidence, to this extent it would seem that legislative fiat is substituted for proof.

If trials are to be rational processes, and the function of the jury is to arrive at truth, from the nature of the case, the minds of the jury must be left free to reason, and facts

must be left to the jury to persuade according to their inherent probative value. For the legislature to substitute its command for proof, or to make the proof of one fact legal proof of another when it is not inherently and logically such, is to substitute legislative fiat for facts, and governmental command for reason.

Western and Atlantic Railroad vs. Mary E. Henderson, 279 U. S. 639, 73 L. E. 884.

In this case, decided on May 27th, 1929, the plaintiff sued the railroad in a state court of Georgia alleging that her husband had been killed by the railroad company by being negligently run over by its engine at a railroad crossing. She alleged numerous grounds of negligence, some of them contradictory. Georgia had the following statute:

"A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars, or other machinery of such company; or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agent has exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

In the trial court the plaintiff asked for and obtained an instruction in substance that proof of injury by the cars of defendant caused the burden to shift "to the railroad company to show employees exercised ordinary care and skill in the particulars wherein they are alleged to have been negligent, and unless it does so, the fact of the injury or damage having been made to appear, the plaintiff . . . would be entitled to recover."

The case was affirmed by the Supreme Court of Georgia and appeal was taken to the U. S. Supreme Court where the statute, as construed by the court, was attacked as denying due process of law.

The Supreme Court said:

"Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act and omission in plaintiff's specification of negligence was the proximate cause of death; and it makes defendant liable unless it showed due care in respect of every matter alleged against it.

"And by authorizing the jury, in the **absence of negligence** to find negligence in the operation of the engine and train, the court **necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's wit-**

nesses tending affirmatively to prove such operation was not negligent in any respect." (Black face ours.)

It seems to the writer that this is necessarily what our decisions do by permitting the jury to use the presumption when the testimony is conflicting and they are in doubt, etc.

It would also seem to be applicable to those cases wherein, though the defendant had introduced proof showing all that was seen or done by the employees and by their testimony negative any negligence on their part, the jury is yet held to be authorized under the prima facie instruction to return a verdict for the plaintiff because no one knows and testifies just where the injured man was at the time of the accident.

It was urged upon the Court that the Legislature had the power to give the effect of evidence to the presumption, and that it should not be dissipated the instant any testimony is taken against it.

Responding to this the Court said:

"Legislation declaring that proof of one fact, or group of facts, shall constitute prima facie evidence of an ultimate fact in issue is valid, **if there is a rational connection between** what **is proved and what is inferred.** A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment."

"**Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property.**"

Again,

"**The mere fact of collision between a railway train and a vehicle . . . . furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of anyone.** Reasoning does not lead from the occurrence back to its cause." (Black face ours.)

The Court stated that appellee relied on the Turnipseed case from Mississippi, previously cited in this paper, in support of her contention. The Court took pains to distinguish the Mississippi statute, the one under discussion, quoting it and pointed out that it was upheld on the ground that it created merely a temporary inference which disappeared when the railroad company had produced "*some*" evidence to the contrary, and that when this was done the

question of negligence was one for the jury on all the evidence.

It said that the Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing testimony.

The Court cited as showing this the case of *Columbus & G. R. Company vs. Fondren,* 145 Miss. 679; and *Railroad Company vs. Brown,* 138 Miss. 39.

At the time, the Fondren case was the last announcement of our court on the question of the construction of the statute relative to its function in jury trials. The plaintiff in the trial in the court below had asked for, and obtained, three instructions in which the jury was told that proof of the injury by the running of the trains was prima facie evidence as to the injury, and the jury was undecided as to the true facts, or should be unable to determine from the evidence just how plaintiff was injured, or there should be such a conflict of theories and testimony that the jury should be unable to determine just how the injury was inflicted, then the jury might resort to the presumption.

Our Supreme Court reversed the case for the granting of these instructions.

The Supreme Court of the United States cited this case as showing that the statute meant to create merely a temporary inference that would yield when some evidence in opposition was introduced.

However, Lee's case, 149 M. 543, and Fondren's case, 154 M. 40, overruled the Fondren case in 145 M. and held that such instructions were proper.

If our statute was upheld because of the construction of it in Fondren's case, 145 M, it would seem that the contrary construction held in this case and Fondren's case, 154 M., would fall within the condemnation of *Railroad Company vs. Henderson.*

It seems to the writer that such instructions give evidentiary value to the statute for jury purposes, a thing condemned by the Supreme Court of the United States.

There is another application of the doctrine of *Railroad Company vs. Henderson* to which it might be well to call attention.

Railroad Company vs. Cole is typical of this line of cases and will be taken as illustrative.

Our court has repeatedly announced that the statute had the effect of casting on the defendant the duty of produc-

ing the evidence as to how the accident occurred, and that this could not be left to conjecture. As inclusive within this duty it is held that the duty of the defendant is not only to negative negligence, but to show how the injured party met his injury, and if this is not done the jury is authorized to decide on the strength of this failure.

In the Brook's case, cited with approval in Cole's case, this is approved as one of the grounds why the case should be sent to the jury, the jury was to decide if this duty had been done.

In Cole's case a trespasser was seen walking down the track in front of the train; after the train had passed he was found by the track with his feet cut off.

The evidence of the defendant was that the whistle was sounded and the bell rung; that Cole was not seen by the fireman or engineer and that the train was properly handled.

Since the defendant could have been negligent only through the acts of its officers and agents, it would appear that if their testimony was believed there was no negligence.

Proof for the plaintiff disputed whether or not the bell had been rung or the whistle blown.

Other witnesses not connected with the defendant testified that they were watching and that no one was on the track at the time of the accident. No bruises were on Cole's body to show that he had been struck by the pilot of the engine. The defendant argued for a peremptory instruction, which was refused, and on appeal this was assigned as error, the defendant contending that all of their testimony showed non negligence, and that there was no testimony to show negligence, nothing but the presumption which had been overcome by the proof outlined.

The court held that the case was properly sent to the jury because the statute required the railroad company to show how the man was injured, and held that unless this was done the statute imposed liability.

Certainly there could be no liability under substantive law in the case, unless the employees of the railroad saw Cole; or, if they did not see him they gave all needed signals and carefully operated the train as the witnesses testified. If it is a jury case simply because the defendant could not show just how the man was killed or injured, and it is left to the jury to say whether or not they would impose liability, then the presumption is used to take the place of evidence

and is permitted to overcome actual evidence. If the presumption is charged to the jury to consider along with the other testimony in the case, in the decision by the jury as to whether due care was exercised or not, this is making an evidentiary use of the presumption. It is authorizing the jury to use the presumption to overturn sworn testimony, or else from it to find negligence in opposition to such testimony.

As we have seen, the Supreme Court of the United States holds that injury from the running of trains is not of itself any actual proof of negligence, and that it cannot be so used by the trier of fact as a substitute for proof for this reason: "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

The Henderson case declares that a statute that creates an arbitrary presumption (and it holds that for the trier of facts to deduce negligence from the mere fact of injury by the running of trains is such) . . . violates due process.

In Cole's case it was contended that the construction placed on the statute was violative of the due process right, but the court disposed of this by saying that the contention was precluded by the decision of the court in the Turnipseed case, having at the time the Landrum case before it. It seems reasonably clear that the Supreme Court of the United States did not understand the Landrum case as did our court in the Cole case, because the Henderson case, the latest pronouncement, cites the Turnipseed case as holding that the Mississippi statute created merely a duty to go forward with the proof and that the presumption disappeared when *some* evidence on the issue was introduced, and that after this the jury was to decide the question on evidence, and not on presumption.

The readers of any article have the right to know any possible bias that a writer may have. I do not represent any railroad, and the litigation that I have, where railroads are involved, is against them. I think it safe to shun the prima facie statute.

Following the Thornhill case, and the rules there laid down, it is reasonably easy now by an examination of subsequent cases to draw instructions with a fair chance of drafting them in accordance with what the court will now sustain. A reading of earlier cases is more confusing than helpful, in my opinion, growing out of a failure of the cases to proceed according to a clear distinction between the legal duty

of going forward with proof and the burden of jury persuasion, or making evidentiary use of the statute for jury purposes.

As I have indicated, I am of the opinion that the true construction of the statute is that it creates merely a duty of going forward with proof as to the existence, or non existence, of facts which, according to the situation, and under the pleadings, might show negligence or care. This duty is not performed unless and until the defendant has introduced enough of such evidence as to each and every such fact so that the judge can say that there is enough evidence to furnish the basis for rational decision. If the defendant has not done this then the judge should enter a verdict for the plaintiff for failure to perform his duty. If, and when, it has done so, the evidence should be passed upon by the jury without reference to the statute, and should not be instructed as to it. It is idle to instruct the jury that proof of injury by the running of the train is evidence of negligence, without having them understand that it is to be used for purposes of their decision as factual material along with the rest of the evidence, where they pay any attention to the instruction at all.

It has been my observation that our juries really do not do so, and the lengthy instructions drawn by plaintiff's attorneys on the prima facie statute seeking to adapt its application under the decisions to the facts of the particular case do very little good so far as the jury is concerned, though they often serve to reverse a judgment.

There is always the danger that an attack on constitutional grounds will again be made upon the statute as construed by our decisions, and it might prove successful.

I have endeavored to indicate where I think the attack may be successfully made.

REGULATION OF COMMON CARRIERS OF PASSENGERS BY BUS*

By J. Morgan Stevens[1]

The history of human progress is largely a history of highways and transportation. The lonesome trail gives way or is converted into the rough meandering dirt road, which in turn becomes the modern improved highway. The condition of the highway and the means of transportation thereon reflect the degree of progress for the particular section and its day. In the United States the blaze through the wilderness was followed by the stage coach. Of course, transportation in its broader sense is by water, as well as by land, and long prior to the advent of the motor vehicle, the people of this great western republic committed themselves to the policy of encouraging the improvement of rivers and harbors and the building of canals, as well as to the principle of government aid to the railroads. The steamboat and the steam engine have served well their day, and are still the most important factors in commercial transportation. Without them we could not have builded a nation, but the advent of the automobile brought swift, fundamental changes in our social and economic life. The history of transportation, therefore, is a review of the rapid changes and improvements in the methods of travel. What the future holds in the way of air transportation will be left to one's imagination.

Some Advantages of the Motor Bus. Notwithstanding the rapid increase in population and the demands for travel, the steam and electric lines are carrying fewer passengers than they did a few years ago. Millions of privately owned automobiles are now used for pleasure and business. Just a few years ago the motor bus was unknown. Today, there are approximately 7,000 motor carrier companies in the United States, operating over approximately 235,000 miles

* Editor's Note.—The case of *State, Ex. Rel. F. D. Hewitt v. The Pickwick-Greyhound Lines, Inc.*, now pending before the Supreme Court of Mississippi, is an attack on the constitutionality of the Motor Transportation Law of that State; and it is an interesting coincidence that this article, and that of Hon. R. C. Beckett, which immediately follows, are now appearing. Both articles were arranged for during the summer of 1929.

1 Member of the Jackson, Mississippi, Bar; former Justice of the Supreme Court of Mississippi; and chairman of the Mississippi Code Commission of 1928.

of highway, and carrying about a billion passengers each year. With the advent of the automobile has come a decline in the volume of passenger transportation by steam railroad and electric lines, especially on the short haul.

Only a few years ago bus transportation was practically unknown. Why then, so sudden a development of this important unit in transportation?

It is not within the scope of this paper to argue the advantages of transportation by bus, and yet the present and ever increasing demand for transportation facilities of this nature have bearing upon the question of regulation. The State in the exercise of its police power must necessarily provide some law of the road regulating the operation of private automobiles. The presence of busses operated by common carriers emphasizes not only statutory regulations to safeguard life and limb, but also to protect the interest of the public, generally. The omnibus affords the same advantages of the automobile.

The first consideration is that of flexibility of route. The omnibus is not confined to any particular highway or street, and certainly not confined to a narrow track, as in the case with street cars and railroads operating on expensively maintained and limited rights of way. The omnibus can take on and discharge passengers at the street curb, or at any place along a country road. The most insignificant farm house has all the advantages of a modern station when it comes to flagging the coach or disembarking in front of the home.

In the second place, a great army of tourists is afforded means of sightseeing by taking a first hand view of the country with its varied attractions, and approaching the towns on the principal or front streets or roads, instead of by a back alley. The Golden West and this blessed Southland of ours present pictures which no artist can paint.

In the third place, the parking problem has already become serious and traffic jams irritating, and most of it brought about by the use of private automobiles. It is more convenient for 25 passengers to use an omnibus on a short route than it would be for 25 individual automobiles to accomplish the same purpose.

Then again, transportation by bus is cheaper than by steam railroad and means an economic saving to the traveling public. It is not unusual to witness an empty street car or local passenger train proceeding along practically empty, as if it were going after somebody. The opportunity and

the advantage to the public of transporting light express like newspapers, small parts of machinery to be delivered at secluded spots, and floral offerings, are perfectly manifest.

Railroads and Busses. The advantages of motor busses over street cars is demonstrated by the fact that several of our larger cities such as Meridian, Hattiesburg and Gulfport, have, by municipal authority, junked their street cars and tracks and instituted bus service instead. We read with interest the statement of Geo. C. Merkel, Secretary-Manager of the Alexandria, Louisiana, Chamber of Commerce, to the effect that transportation service by bus rather than by street cars appears to be much more economical and advantageous to that city (Bus Transportation, Dec. 1929). Other testimonials of a similar nature are easily available.

Likewise, the steam railroads are rapidly getting into the bus business, as witnessed by the transcontinental bus service inaugurated by the Union Pacific Railroad through subsidiary companies and interline agreements (Bus Transportation, December 1929); The Chicago, Burlington & Quincy Railroad through its subsidiary, the Burlington Transportation Company, having a bus service extending over three states and so arranged as to be coordinated with passenger schedules of the parent railroad company (Bus Transportation, January 1, 1930, page 1); the Rock Island Lines, through its subsidiary, the Rock Island Motor Transit Company; the Missouri Pacific Railroad, through its subsidiary, the Missouri Pacific Transportation Company, now operating more than 4,000 miles of bus lines; and as also reflected by the recent application of the Central Transportation Company for a certificate of public convenience and necessity, as a subsidiary of the Illinois Central (Bus Transportation, January 1930, page 45). Furthermore, the American Railway Association has a motor transport division, which holds frequent meetings to discuss the question of why steam railroads should operate busses and their problems of bus transportation. At their meeting in St. Louis, February 26, 1929, P. J. Neff, of the Missouri Transportation Company, handled the subject, "Why the Steam Carriers Should Operate Motor Coach Service," and there stated that class one railroad passenger business had declined in revenue $312,000,000 per year, whereas if the growth from 1920 to 1927 had progressed in its normal fashion, there would have been an increase of $400,000,000 annually. At the same meeting H. Z. Maxwell, of the Penn-

sylvania Railroad, is quoted as saying that his company had found it easy to get permission to withdraw unprofitable train service if prepared to operate a subsidiary bus service (Bus Transportation, April, 1929, pages 191-192). Likewise, Mr. Frank R. Fageol, President of the Twin Coach Corporation, Kent, Ohio, large manufacturers of motor coaches, said, "I am looking forward with interest to big developments in bus operations through steam railroads' reported plans to secure control of, or substantial interest in, many of the leading independent bus companies."

As shown in a convenient tabular form, "Basic Facts about Bus Transportation," in the February 1930 issue of Bus Transportation, page 59, the number of steam railroads and subsidiaries now operating is 66.

In a full page advertisement by "The Texas Company" appearing in leading current magazines, directing attention to "Covered Wagons of 1930" and particularly to the large Nitecoach of the Pickwick-Greyhound System, is the following statement:

"Twenty years ago the first primitive motor bus chugged up Fifth Avenue. Today there are close to 100,000 swift comfortable busses owned and operated by modern unified bus lines."

The sound reasons for State regulation may be summarized as follows:

First, is the necessity of protecting and preserving our highways. It is now the fixed policy not only of the State but of the United States to build and maintain modern highways. There are millions of private cars operating on these highways, traffic is becoming more and more congested, and the roads subjected to increasing use and abuse. The addition of common carrier busses on the highways emphasizes the need for protection.

In the second place, pedestrians and occupants of private cars are entitled to some protection from those engaged in using the highways for profit.

A third reason is the necessity to prevent the operation of an excessive number of common carriers on the highway, and to prevent undue competition. The preventing of undue competition protects the public. If the State cannot regulate common carriers by busses, then the highways might easily become lined with vehicles operated by carriers, thus increasing the probability of collisions and also increasing the overhead expense of each common carrier. The wear and tear on the vehicle is an element to be considered in the public interest. In other words, a licensed operator is

entitled to protection to the end that it may receive a reasonable return upon its investment. The public is entitled to an adequate and safe operation. In fact, the interest of the traveling public should be the prime consideration.

Procedure for Regulation. There are two methods of approach. A few of the states have so construed the existing law touching public utilities or common carriers as sufficiently comprehensive to embrace motor transportation. It appears that in Maryland the decision was reached that all common carrier vehicles on the highways must register with the Commission (P. U. R. 1915 C 365, 925). The Georgia Railroad Commission reached the same conclusion. So, likewise, Pennsylvania and Arizona. One or two decisions, however, seem to be to the contrary as witnesses an early decision in California. *Western Association vs. Hackett, P. U. R.* 1915 F. 997; *Arkansas Railroad Commission vs. Independent Bus Line,* 285 S. W. 388.

The second and what now appears to be the well settled method of bringing motor carrier operation under state control is through and by proper statutory enactment. It now appears that each of the states in the Union and the District of Columbia have state regulation. The editors and publishers of "Bus Transportation" have recently made a survey of state regulation and the result of this survey just published will be found in the February 1930 issue, page 90. Each state in the Union is there listed with the regulatory agency. Many of the agencies are denominated "Railroad Commission," as in Mississippi. Many of these public bodies are called "Public Utilities Commission" or "Public Service Commission," and in practically every state regulation is now assured by definite statutes on the subject.

The process of regulation is to require a "certificate of public convenience and necessity". This phrase is not peculiar to motor transport law. For many years it has been applied in authorizing railroads to build or extend new lines; to the application of certain road laws; to telephone and telegraph lines; to cotton gins, etc. The applicable statute governs the procedure. The usual requirement is that the applicant must file his petition before the Railroad Commission or regulatory body having jurisdiction, and set out in his application those things required by the statute to be shown as conditions precedent, such as a financial statement of the applicant, description of the equipment to be devoted to the public use, the highway or route over

which the applicant proposes to operate, the proposed schedules and rates to be charged, etc. Notice is usually required to other transportation companies likely to be affected by the granting of the certificate, and a hearing had by the Commission, upon due notice to parties in interest. The question whether the Commission in hearing the application is exercising a legislative or judicial power is quite interesting and the scope of this paper will not permit a legal analysis of that question. Some of the states require the Commission to fix the time for the exercise of the franchise, while others contemplate an indeterminate time. Another very interesting legal question is whether the certificate confers upon the applicant property rights, which the courts will at all times protect, or whether the certificate is a mere license to use the highway. This question has bearing upon the right of the applicant to transfer a certificate, a question about which the courts seem to differ. There are many questions pertaining to procedure, which are beyond the scope of this paper.

A splendid detailed discussion of the process of regulation, both as pertains to intra-state and interstate operators, will be found in "Motor Carrier Regulation in the United States," by George (Band & White, Spartenburg, S. C.).

Interstate Carriers. A large percent of present bus operation is interstate. In considering, therefore, the extent to which the Railroad Commission can regulate bus operations, we might first direct attention to the well established fact that a common carrier may engage in interstate commerce, notwithstanding the Commission denies his application for a certificate. It is equally established, however, that a common carrier must have a certificate to do intra-state business. *Chambersburg G. & W. Street Railway vs. Hardman (Pa.) P. U. R.* 1921 C 628; *Genesco-Rock Island Bus Company vs. Hilbert (Illinois) P. U. R.* 1923 E 311; *East St. L. C. & W. R. Co. vs. Dingerson (Ill.) P. U. R.* 1924 C 127; *Interstate Motor Transit Co. vs. Derr (Mont.)* (1924) 228 Pac. 624; *Northern Pacific Ry. Co. vs. Schoenfeldt* (1923) 213 Pac. 26; *Schmidt vs. Dept. of P. W. (Wash.)* (1923), 213 Pac. 31; *Re. Engelke (N. Y.) P. U. R.* 1921 C 71; *People vs. Barbuas* (1923) 230 Ill. App. 560.

The two pioneer decisions by the Supreme Court of the United States with reference to interstate operators are

Buck vs. Kuykendall, 267 U. S. 308, 69 L. Ed. 623; and *Bush & Sons Co. vs. Maloy,* 267 U. S. 317, 69 L. Ed. 627.

Headnote in the Buck case reads:

"A state cannot prohibit the use on an interstate highway of auto vehicles by common carriers for hire, over regular routes, without securing a certificate from a public official declaring that public convenience and necessity require such operation."

The headnote in the other case is as follows:

"A state cannot forbid the use on its highways of motor vehicles operated by common carriers for hire, over regular routes, in interstate commerce, merely because existing lines of transportation would be prejudiced thereby."

The result of these two decisions in the absence of legislation by the Federal Congress has been to turn loose the interstate operators on the nations highways without regulation whatsoever, except as to compliance with the law of the road and the payment of taxes.

In the later tax case of *Clark vs. Poor,* decided by the Supreme Court of the United States, May 1927, 71 L. Ed. 1199, Mr. Justice Brandeis, who spoke for the court in the Buck case, makes clear that the highways are public property, and are subject to state regulations, and that those who use the highways may be required to contribute to their upkeep, although engaged exclusively in interstate commerce. The spirit and the tone of the decision apparently restricts the force and effect of the prior decisions in the Buck and Bush cases, and while the prior decisions declared that the state could not refuse a certificate of public convenience and necessity to an interstate operator, this later case declares that the carrier "may be required to secure a certificate from the state officials, and pay a tax not required of persons using automobiles on the highway generally, for the maintenance and repair of the highways and the administration and enforcement of the laws governing the use of the same."

From the foregoing decisions, it appears, therefore, that the state cannot deny a certificate for interstate operation and in event the Railroad Commission does deny, the applicant may nevertheless operate interstate by paying the proper taxes for the upkeep of the highways. On the contrary, it would appear that the state can require interstate operators to make application and be licensed and pay the proper tax. In other words, for a state to deny a certificate is a burden upon or interference with interstate commerce, but for a state to require a reasonable tax for the upkeep

of the highways does not burden or interfere with interstate commerce. Again it is settled by the decisions that the state can deny a certificate to an interstate carrier to engage in intra-state operation. *Washington Motor Coach Co. vs. West,* P. U. R. 1927 C 603; *Hazleton vs. Interstate Stages* (N. H.), 133 Atl. 457. It is not a burden on interstate commerce to deny to an interstate operator the privilege of carrying on intra-state business. *Cannonball Transportation Co. vs. Public Utilities Commission,* 149 N. E. 713; *Interstate Busses Corp. vs. Holyoke St. Ry.,* 71 L. Ed. 530.

Another thing which the state through regulation cannot do is to convert a private contract carrier into a common carrier "against his will." This was settled in the case of *Frost vs. Railroad Commission,* 70 L. Ed. 1101. As reflected by that case, Frost Brothers had a private contract to haul citrus fruit between fixed points within the State of California. The regulatory commission ordered Frost to cease operations until a certificate of public convenience and necessity was obtained. The case found its way to the Supreme Court of the U. S. which by a divided court, ruled as shown by headnote No. 1:

"A private carrier cannot be converted against his will into a common carrier by mere legislative command."

As shown by the very interesting dissenting opinion of Mr. Justice Holmes, the questions involved were very close indeed. By this decision the highest court of the nation has said to the state authorities that although they may require a certificate from a purely intra-state operator, one transporting persons or property for hire, yet when he has simply a private contract to transport property for hire, the requirement of a certificate is a violation of constitutional rights. The result of the foregoing decisions has been to encourage "wild-cat" operators or "snipers" and has emphasized the necessity of federal control, and furnishes good argument for the passage of the Parker Bill, now pending before Congress.

Mr. George, pages 16 and 17, in his splendid book above referred to, says, as to the validity of state regulation:

"There has been relatively little litigation over the validity of the principle of regulation, and when such has arisen the courts, state and federal, have taken the ground that such regulation is a valid exercise of the state police power to preserve its highways, to restrict the use of them for private profit, and to protect the health, comfort, convenience, safety, and general welfare of its people.

"Between 1915 and 1928 the courts in thirteen different states have decided that regulation is valid. The state can delegate to the commission and to units of local government the exercise of state power to establish rules and regulations concerning the use of the highways by motor vehicles, and where the commission enjoys the power to determine the period in which the recipient of the certificate shall exercise the privileges granted, the commission may specify in the certificate whatever conditions and terms are demanded by public convenience and necessity. The person who seeks to show a statute unconstitutional must present evidence relative to the application of the statute to himself, and not as it affects someone else."

Decisions in support of the text are in part listed as follows:

"Re Automobile Traffic (Ariz.) P. U. R. 1915 C. 945; Ex Parte Dickey (W. Va. Sup. Ct. of App.) 85 S. E. 781 (1915); Haddock vs. State (Ariz. Sup. Ct.) 201 Pac. 847; Mason vs. Intercity Terminal Co. (Ark. Sup. Ct.) 251 S. W. 10 (1923); Dobeson vs. Mescall (N. Y. Sup. Ct., App. Div.) 199 N. Y. Supplement 802, citing Hadfield vs. Lundin, 98 Wash. 657; Schoenfeldt vs. Seattle, 265 Fed. 726; and People vs. Rosenheimer, 209 N. Y. 215; Gruber vs. Commonwealth (Va. Sup. Ct. of App.) 125 S. E. 427; P. U. R. 1924 B, 193 (Mont.); Restivo vs. West (Md. Ct. of App.), 129 Atl. 884; Greely Transportation Co. vs. People (Col. Sup. Ct.) 245 Pac. 720 (1926); Packard vs. Banton, 264 U. S. 140; Ex Parte Tindal, 229 Pac. 125; Gilmer vs. Pub. Utils. Com. (Utah Sup. Ct.) P. U. R. 1926 D. 469; case in note 49; and more recently Roberto vs. Commissioners of Public Utilities (Mass. Sup. Jud. Ct.) 160 N. E. 321, decided March 5, 1928; Harlacker vs. Adams Transit Co. (Pa.) P. U. R. 1928 A. 12."

The ultimate success of transportation by motor busses depends largely on the consolidation and merger of small or short lines into the larger or more responsible companies, in keeping with the modern tendency in railroad regulation and operation.

I would unhesitatingly say that bus operators are 100 per cent in favor of reasonable regulation. Mr. Pond, Public Utilities, page 10, says:

"This industry (motor vehicle common carriers) has developed so rapidly and independently of any such control that the questions arising under conditions of competition in the absence of their control and regulation by Commission are demanding early and adequate attention. Many jurisdictions are now solving these questions as they have heretofore been determined as to the other utilities by their proper regulation and control in the interest of such motor vehicles themselves, and with reference to other existing common carriers to the end that all concerned, and especially the public and its service, may have full consid-

eration and fair treatment. If, as experience seems to justify and require, regulation is to take the place of competition in this, as in other fields of public utilities, in order to avoid the expense of needless duplication of investments and operating costs, for the purpose of securing the best possible service at the least expense, motor busses, trucks, and all similar forms of common carrier service must be regulated and controlled by impartial State Commissions of trained experts having jurisdiction over public utilities generally, and especially over all forms of communication and transportation."

Mr. Thomas B. Wilson, So. Pacific Motor Transportation Company, says of regulation:

"The public will be benefited rather than burdened in the long run. Fares will become stabilized and in return responsible and reliable service will be received. Under regulation, bus competition will continue to exist on most all principal highways, but it will be 'regulated' in the public service * * * * Regulation will tend to stabilize rates."

REQUIREMENT FOR LIABILITY INSURANCE

Most of the states require the applicant not only to give a bond for the faithful compliance with the rules and regulations of the Commission, but require also liability insurance to protect the public against damages sustained by negligent operations. The amount of passenger liability protection varies widely. The validity of this requirement has been upheld by state decisions. *People vs. Martin* (N. Y.), 197 N. Y. Supp. 28; *Werksler vs. Collins* (Ill.), 147 N. E. 797; *Hester vs. Railroad Commission* (Ark.), 287 S. W. 763; *People vs. Barbuas,* 230 Ill. App. 560; *Interstate Transit Co. vs. Berr* (Mont.) 228, Pac. 624; but in the Liberty Highway Case, 294 Fed. 703 and *Redball Transit Co. vs. Marshall,* 8 Fed. (2nd) 635, Federal District Courts have ruled that indemnity insurance constitutes an unreasonable burden on interstate commerce when exacted of a motor transportation company engaged in interstate commerce, and the Supreme Court of the U. S. has stricken down as invalid a state requirement of indemnity insurance on goods handled in interstate commerce. *Mich. Pub. Co. vs. Duke,* 266 U. S. 570, 69 L. Ed. 445.

The question of insurance as applied to carriers of passengers was attempted to be raised in *Clark vs. Poor,* supra, but the exaction was waived by the Commission and attention directed to this fact by the Supreme Court in its opinion. The Missouri Commission, however, has boldly required insurance by one engaged in carrying passengers

both interstate and intrastate, and the Indiana Commission made the giving of insurance a condition of granting a certificate, *Pickwick Stages System,* P. U. R. 1928 B 1; *Shore Line Stages Co.,* P. U. R. 1928 C. 175. It is my information that interstate carriers are no longer objecting to this requirement especially where they are doing both an intrastate and inter-state business and that they appreciate the necessity of this protection both for themselves and for the public.

Other legitimate requirements embrace those for licensing of drivers, supervision of time schedules, rates and character of equipment employed. These manifestly are in the public interest and are strictly administrative.

It would seem also that the Commission has the power to revoke a certificate for cause upon proper hearing and in general to exercise, under statutory authority, the same supervisory powers as the Commission usually exercises over railroads and other common carriers. The success of regulation depends upon the personnel of the Commission or the regulatory body. The power of the courts to intervene is somewhat restricted. Administrative powers must be given in more or less general terms and the details left to the Commission, but responsibility for success or failure depends upon the Commissioners—their honesty, ability and experience.

The suggestion has been made that under Section 170 of Mississippi's Constitution, full jurisdiction over roads, ferries and bridges is conferred upon the respective boards of supervisors, and that the legislature has no constitutional power to invest jurisdiction over motor transportation companies in the Railroad Commission. Inasmuch as this subject is now pending before the Supreme Court, I refrain from elaborate discussion. I would, however, point out the fact as suggestive for consideration, that by an amendment to Section 170, jurisdiction, for construction and maintenance, over state highways is invested in the State Highway Department and that practically all of the licensed carriers are operating over U. S. highways. I would also point out that under the terms of the Constitution, the jurisdiction is "to be exercised in accordance with such regulations as the legislature may prescribe," and that no where in the motor transportation law of Mississippi, is there any effort to divest the boards of supervisors of their reasonable police power.

In conclusion, I would say that if motor transportation companies are to be regulated, then by the same token, they should be protected by the Commission and by the courts. In this connection, the very recent case of *Frost vs. Corporation Commission of Oklahoma,* 73 L. Ed. 483, to my mind points unerringly to the conclusion that a public franchise of this nature is not a mere license, but is a franchise in the nature of property rights fully protected by the 14th Amendment to the Federal Constitution.

Headnotes 1, 2 and 3 read:

"1. The right to operate a cotton gin and collect tolls therefor under a statute declaring such business to be a public utility, to be permitted only in case of public necessity, is not a mere license, but is a franchise granted in consideration of the performance of public service, and constitutes property within the protection of the 14th Amendment to the Federal Constitution.

"2. A franchise to operate a public cotton gin is exclusive against one who attempts to do so without obtaining a permit, or under a void permit.

"3. One having a franchise to operate a cotton gin may resort to a court of equity to restrain the illegal operation of a competing gin under a void permit, upon the ground that it is an injurious invasion of his property rights."

It will be observed that the franchise in the Frost case involved a certificate to operate a cotton gin. I can see no substantial difference between that kind of certificate and one to operate a motor transportation service.

THE EXTENT TO WHICH THE MISSISSIPPI RAILROAD COMMISSION MAY REGULATE AND CONTROL THE OPERATION OF BUSSES.

By Richard Capel Beckett*

Section 186 of the Constitution of 1890 provides that "The Legislature shall pass laws to prevent abuses, unjust discrimination and extortion in all charges of express, telephone, sleeping car, telegraph and railroad companies and shall enact laws for the supervision of railroads, express, telephone, telegraph and sleeping car companies *and other common carriers in the state,* by commission or otherwise, and shall provide adequate penalty to the extent, if necessary for that purpose, of forfeiture of their franchise."

Under the authority of this section The Legislature enacted Chapter 128 of the Laws of 1926 known as the Motor Transportation Law. This statute is entitled, "An Act to license, supervise, regulate and control the operation of motor vehicles over and upon the public highways in the State of Mississippi."

Its first section provides that no motor vehicle shall be operated over the public roads in the State of Mississippi as a common carrier without a certificate of convenience and necessity authorizing such service.

This section in effect rules motor busses off the public roads, unless those who wish to operate them secure a certificate of convenience and necessity. The Legislature has the right to do this. Common carriers are entirely different from those who use the highways for ordinary purposes, and they may be ruled off the roads entirely or required to satisfy such conditions as the Legislature may impose. *Choate vs. Illinois Commerce Commission* (Illinois 1923), 141 N. E. 12; *Cincinnati Traction Company vs. Public Utility Commission of Ohio* (Ohio 1925), 148 N. E. 1921; *Sanger vs. Lukens,* 24 Fed. (2nd) 226; *Northern Pacific Railroad Company vs. Yakima Stages, Inc.* (Washington 1925), 238 Pacific 905.

Criminal prosecution of those attempting to operate in violation of such statutes has been upheld. *State vs. Cap-*

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lan (Vermont 1927), 135 Atlantic 705; *Ex Parte Tindall* (Oklahoma 1924), 229 Pac. 125.

In many cases injunctions have been granted forbidding the operation of common carriers on public highways without obtaining such certificate.

Application for a certificate must be denied unless the applicant makes an affirmative showing that there is a substantial public need for the operation of the bus and that the benefit to the public will clearly outweigh the detriments. Where an application is made, and the certificate is granted by a Commission, without adequate proof of public convenience and necessity, the certificate will be set aside by the courts, on the application of any interested person. *Railroad Company vs. Oklahoma* (Oklahoma 1926), 252 Pacific 849; *Columbus Railway & Power Company vs. Public Utility Commission of Ohio* (Ohio 1927), 155 N. E. 647; *Monongahela Public Service Company vs. State Railroad Commission of West Virginia* (West Va. 1927), 139 S. E. 744.

Where a railroad company or any other common carrier is already in business along substantially the same route as the proposed bus line, the existing company must be given an opportunity to extend and improve its service, if necessary, before a competing company will be allowed in the field. *Egyptian Transportation System vs. L. & N. R. R. Co.,* 321 Ill. 588, 152 N. E. 513; *Monongahela Public Service Company vs. State Railroad Commission,* 139 S. E. 744. *Railroad Company vs. Oklahoma,* 252 Pac. 849; *Bartonville Bus Line vs. Eagle Motor Coach Line* (Illinois 1927), 152 N. E. 175.

The Mississippi Railroad Commission is given the power and authority, and required by the law, to regulate all auto transportation companies, commonly called bus lines, to fix just, reasonable and non-discriminatory rates and charges; to regulate their facilities, service and safety of operation and make rules for the inspection of their motor vehicles; to require the filing of annual reports and tariffs and in general to supervise and regulate all matters affecting the relationship *between bus lines and the traveling public.* The Commission in fixing their rules and regulations is instructed to avoid unreasonable competition between Transportation Companies, so far as possible.

No time schedule or tariff rates may be put into effect or charged without the authority of the Commission. No service may be abandoned without authority of the Com-

mission. No route may be changed without the Commission's authority. Certificates of convenience and necessity, when obtained, may not be transferred from one owner to the other without the consent of the Commission, as such a permit is personal and is based upon the ability of the person to whom issued, to give the proposed service in a satisfactory manner and to protect the public.

Every bus line is required to give a bond satisfactory to the Commission covering injuries and damages occurring to persons or property arising out of its operation.

Penalties are provided for violations of the statute. The Motor Transportation Law provides two exceptions from its operation: (1) that the Act shall not apply to interstate or foreign commerce, "except in so far as the same may be permitted under the provisions of the Constitution of the United States"; and (2) "that no provision in the Act shall authorize the use, by any Transportation Company of any public highway in any municipality in violation of any ordinances of such city or shall the Act be construed as taking from or curtailing the right of any municipality to regulate and control the route, parking, speed or the safety of operation of a motor vehicle operated under the terms of the Act, or the general police power of any such municipality."

It is also provided that the Act shall not apply to motor vehicles employed exclusively in the transportation of children to and from school or engaged exclusively in transporting agricultural, horticultural, dairy or farm products from the point of production into the primary market, nor to motor vehicles used exclusively in transporting dairy products, or motor vehicles engaged exclusively in transporting or delivering freight within any city or village in this State, or between contiguous villages or cities, or any transportation company engaged exclusively in operating taxicabs or hotel busses from a depot to a hotel, or to any system of motor busses of electric lines or other transportation system exclusively within the limits of any city, town or village, or which does not extend more than three miles beyond the city limits.

It is, therefore, apparent from the statute that, with the specific exceptions therein provided, the Mississippi Railroad Commission has the power and the duty to regulate common carriers by motor vehicles over the public highways to an extent which is somewhat similar but very much more complete than the regulatory powers of the Commission over railroads. Railroad Companies usually own their own

tracks and rights of way and are subject to regulation only to the extent that they violate two fundamental requirements of operation as common carriers, i. e.: (1) that their service shall be adequate to the public need, and (2) that their charges shall be reasonable and non-discriminatory. The power of the Commission to regulate motor busses is much greater because the State Government has the right to forbid motor busses to operate as carriers over public highways at all, and having that right, may make them subject to any conditions whatever that the State imposes; and the powers of the State in this regard have been by the Motor Transportation Law, conferred upon the Mississippi Railroad Commission. For example, the Commission requires bus lines to give a bond to pay damages to persons injured, but the Commission has no power to require a Railroad Company to give such a bond.

After a certificate of convenience and necessity is granted, the Commission may not fix charges which are less than reasonable compensation for the services rendered, because the motor bus company may not abandon the service without the consent of the Commission and if required to continue to operate at charges which do not afford reasonable compensation it would be the taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. Nor may the Commission discriminate as between carriers so as to require one motor bus to charge substantially less than another for similar service, for so to do would be a denial of the equal protection of the laws, in violation of the Federal Constitution.

But subject to these constitutional rights, the power of the Commission over the operation of motor busses, as common carriers, in intrastate business, is plenary.

The Act provides that the Commission shall have no authority over interstate or foreign commerce "except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress." So it is held that a State Commission may not forbid bus lines to operate in interstate commerce without a permit. *Michigan Public Utility Commission vs. Duke,* 266 U. S. 570; *Buck vs. Kuykendall,* 267 U. S. 307; *Bush vs. Maloy,* 267 U. S. 317. It is held that a State Commission may not refuse a bus line a permit to engage in interstate commerce under pretense of public regulation of roads. *Buck vs. Kuykendall,* supra. In the case of *Bush vs. Maloy,*

supra, it was held that a State Commission had no right to refuse a permit to a bus line to engage in interstate commerce on its roads *where the vehicle would impose no undue burden on roads whether because of weight, size or congestion,* but the Commission, under its powers of regulation, may rightfully prescribe rules necessary for public safety and order in respect to vehicles moving in interstate commerce as well as others. *Michigan Public Utility Commission vs. Duke,* supra; *Hendrick vs. Maryland,* 235 U. S. 610, 622; *Kane vs. New Jersey,* 242 U. S. 160, 167; *Morris vs. Duly,* 274 U. S. 135.

The Statute provides by its own terms that nothing therein contained should be construed to prevent municipalities from enacting and enforcing proper traffic and police regulations. In *Pine Bluff vs. Arkansas Travelers Bus Co.,* 171 Ark. 727 (1926), 285 S. W. 375, the court said: "The Arkansas Railroad Commission was established, among other things, for the purpose of regulating motor busses, but there is no inconsistency between its powers and the power given cities to control their streets." In that case there was an ordinance of the City of Pine Bluff regulating the operation of motor busses in the city and requiring that they should establish stations, at their own expense, at designated places within the city, for the purpose of taking on and discharging passengers, and forbidding public busses from stopping on the streets of the city for taking on and discharging passengers except at their regular stations. The Arkansas Traveler Bus Company obtained the certificate of convenience and necessity from the Railroad Commission authorizing them to operate in and through the City of Pine Bluff and undertook to take on and discharge passengers in violation of the ordinance of the city. It was prosecuted in the municipal court and required to pay a fine. The Supreme Court upheld the validity of the ordinance, saying that both the Railroad Commission and the city had the right to impose regulations. The court said:

"It is a rule of universal application in this country that, when private property is devoted to a public use, it is subject to regulation under the police power. It is well settled that, in the absence of constitutional limitations, the Legislature has the right to regulate and prescribe the rules according to which the business of common carriers may be conducted, and this power may be delegated to municipal corporations, to be exercised for the promotion of the public convenience. Hence it is well settled that the right of a citizen to travel upon the streets and transport his property thereon in the ordinary course of things is wholly

different from that of a common carrier, who makes the streets his place of business and uses them for private gain in the running of motor busses. The former is the common right of every one, and the latter is a special or exceptional use of the streets, not common to all the citizens of the state."

It has been held in Pennsylvania that the power of cities to regulate busses carrying passengers for hire was suspended by the State Law giving jurisdiction to the State Commission. *White Line Taxi Company vs. Brownsville* (Pa. 1927), 140 Atlantic 520. But this decision was based upon a construction of the statute giving the State Commission full jurisdiction over motor busses which was construed to take away authority from the cities. In Mississippi the statute expressly provides that motor busses must be operated in accordance with all ordinances or charter provisions of the cities.

There are two other bodies authorized by the Constitution of Mississippi to exercise certain powers which might interfere or affect the operation of bus lines: (1) the State Highway Commission and (2) the Boards of Supervisors of the respective counties.

Under the Constitution and the laws of Mississippi, supervision of public roads, streets and highways is to a certain extent divided between (1) The State Legislature, (2) The State Highway Commission, (3) The Boards of Supervisors of the different counties, and (4) The Municipalities. The exact limits between the powers of these different bodies is not always clear. Cities have certain powers over their own streets, but these powers are entirely subject to the Legislature. In *Village of Ridgeland vs. Madison County* (Mississippi 1929), 122 Southern 753, it was held that the power of the Legislature over municipal streets is plenary, unless in exceptional cases not here presented. It has the power to divest the municipality of all control over their streets and authorize their use by corporations without compensation to the municipality. *Canton vs. Cotton Warehouse Co.,* 84 Miss. 290, 36 Southern 266.

The State Highway Commission, authorized by Section 170 of the Constitution of 1890, has the right to control and supervise the construction and maintenance of those highways which are designated by the Legislature as State Highways; but it will be noted that the authority of the State Highway Commission is limited by the Constitution, to construction and maintenance only.

Under the Constitution of Mississippi (Section 170) the general and full jurisdiction of roads, ferries and bridges throughout the State, is clearly given to the Boards of Supervisors of the respective counties.

Inasmuch as there seems to be some doubt felt throughout the State as to the respective rights of the Boards of Supervisors and the State Railroad Commission over the operation of motor busses, this question deserves examination with care.

Section 170 of the Constitution of 1890, after providing that each county shall be divided into five districts, each of which shall elect one member of the Board of Supervisors, provides as follows:

"The Board of Supervisors shall have full jurisdiction of roads, ferries and bridges to be exercised in accordance with such regulation as the legislature may prescribe, ..., provided however, that the legislature may have the power to designate certain highways as 'State Highways' and place such highways under the control and supervision of the State Highway Commission for construction and maintenance."

It has been held in many cases that under this constitutional provision the Board of Supervisors of each county has full jurisdiction over the roads and bridges thereof. Although the Legislature may prescribe the method or instrumentality by which the Board of Supervisors shall exercise its control over roads and bridges, the Legislature can not take away, or substantially impair, the full control of Boards of Supervisors over roads and bridges. *Howe vs. State,* 53 Miss. 57; *Board vs. Arrighi,* 54 Miss. 668; *Paxton vs. Baum,* 59 Miss. 531; *Seal vs. Donnelly,* 60 Miss. 658. In *State vs. Bolivar County,* 111 Miss. 867, it was held that Chapter 169 of the laws of 1916, which undertook to give Road Commissioners full authority over roads and road districts created thereby, is unconstitutional in that it undertook to deprive the Boards of Supervisors of a constitutional jurisdiction. In *Havens vs. Hughes,* 128 Miss. 650, it was held that Chapter 173 of the Laws of 1914, which provided a method by which practically all jurisdiction of the Boards of Supervisors over roads and bridges might be withdrawn from such Boards and vested in Road Commissions, is violative of this section. On the other hand it has been held that laws providing for the creation of road dis-

tricts with commissioners, which are subject to the control and direction of the Boards of Supervisors, are valid. The Boards of Supervisors are vested with powers which are legislative as well as powers which are judicial and powers which are executive. See *Ex Parte Fritz,* 86 Miss. 210; *Haley vs. State,* 108 Miss. 899. The Board of Supervisors has the constitutional right to pass reasonable regulations for the use of roads, bridges and ferries. In *Covington County vs. Collins,* 92 Miss. 330, it was held that the Board of Supervisors might prohibit the use of a public highway by a traction engine used by an individual to haul wagons, inasmuch as such traction engine was, at that time, such a strange and unusual contraption as to constitute a nuisance and to cause great inconvenience and danger by frightening horses and cattle.

Section 8336, Hemmingway's Code 1927, provides that the Board of Supervisors of any county may declare what is an unusual load to be conveyed over roads and bridges in the county and shall have the power to protect their roads and bridges from unusual and uncommon use where the same is likely to injure or impair the usefulness as a public highway. Section 8536 to 8539, Hemmingway's Code, provides that the Boards may regulate the maximum load of vehicles by publishing notices. Probably the Boards of Supervisors had this power under the Constitution without the legislative sanction. At any rate, many counties have enacted ordinances prescribing the weight of vehicles which may traverse their highways; for example, an ordinance of DeSoto County, passed in October 1921, prohibits any vehicle transporting a load of over 6000 pounds on any road or bridge in that county, with a penalty increasing after the first offense. In Carroll County there is an ordinance of the Board of Supervisors restricting the weight of the loads transported on its highways to amounts weighing from 2000 pounds to 10,000 pounds according to the width of tires of the vehicle. Yazoo County has an ordinance enacted in 1929 providing a graduated scale of weights according to the width of tires, but with the maximum weight, including the vehicle, fixed at 12,000 pounds. Madison County has a curious ordinance, enacted in 1925, providing that in dry weather it shall be lawful for a vehicle weighing, together with its load, not more than 20,000 pounds to traverse the highways and bridges of that county, but in wet weather or when the roads are soft, the maximum weight of vehicle and load is fixed at 4,500 pounds. Wet weather is defined

as including the period within twenty-four hours after any rain or snow; it is further provided that if any vehicle weighing more than 4,500 pounds shall start and get caught in a rain it shall proceed immediately back whence it came, which may be done without penalty, but if it undertakes to complete the journey after the rain starts the fine may be imposed.

The Board of Supervisors is held liable for damages, if any are due to faulty construction of a highway even though the highway may have been built by the Commissioners of a Road District, on the ground that the Board of Supervisors has full and ultimate jurisdiction over the road. *Covington County vs. Watts,* 120 Miss. 428.

Therefore it seems clear that the Boards of Supervisors may pass reasonable regulations governing traffic generally over their highways and especially reasonable rules for the protection of their highways from uncommon and unusual burdens. It is only natural that the authority which has the duty of maintaining bridges shall have the power to protect the bridges from loads which they were not built to bear. It seems probable under the Constitution that the Boards of Supervisors have the full legislative power to enact all reasonable police regulations and traffic rules in their respective counties. As a matter of fact, the Boards of Supervisors do not seem to have exercised to any great extent the legislative powers which they possess. On the other hand, the State Legislature which has little or no power over roads, except to provide regulations governing the exercise of the powers of the Boards of Supervisors, and to designate certain highways as State Highways and thereby place them under the control and supervision of the State Highway Commission for construction and maintenance, has, nevertheless, enacted many road laws. For example Section 6680 Hemmingway's Code 1927 (Laws of 1916, Chapter 116) provides that motor vehicles may not be operated in cities or closely built regions at a greater speed than 15 miles per hour or elsewhere at a greater speed than 30 miles per hour. Section 6681 provides that motor vehicles shall not pass horses or pedestrians at a greater speed than 8 miles per hour nor cross a levee or causeway less than 20 ft. wide at more than 10 miles per hour. Section 6682 provides that the speed of motor vehicles on bridges and curves shall be limited to 10 miles per hour. Section 6686 provides that motor vehicles

when meeting a horse or another vehicle, must be turned to the right of the center of the road.

If the Board of Supervisors of any County should pass an ordinance governing the use of the roads of that county in conflict with the state statute, it seems that the ordinance of the Board would prevail. *Carey vs. Guest* (Montana 1927), 258 Pacific 236. In that case it was held that where a state statute limited speed to 6 miles per hour, but the ordinance of a city limited the speed to 12 miles per hour, that the state statute was inoperative within the city and the ordinance would prevail, citing cases from Illinois, New Jersey, Alabama, Georgia, New York, and Missouri. This rule was established largely on the theory that each city knows best what rate of speed should be permitted on its own streets. As this is the general rule in so many states, there seems even stronger reason within the State of Mississippi why the road laws of the counties should prevail over the laws enacted by the Legislature as the counties not only know their own roads best but also have, under the Constitution, the full jurisdiction over, and responsibility for, roads within their boundaries.

So far as "State Highways" are concerned the State Highway Commission is given jurisdiction over them but only for the purpose of construction and maintenance. It cannot be assumed that the words "for construction and maintenance" have no significance, especially as they occur in the same sentence which says that the Board of Supervisors shall have full jurisdiction over roads, ferries and bridges, followed by the provision that the State Highway Commission should have control and supervision over state highways for construction and maintenance. Obviously, control and supervision for construction and maintenance is much more limited than the full jurisdiction given to the Board of Supervisors. It seems, therefore, that it was not the intention of the Constitution to take State Highways entirely out of the jurisdiction of the Boards of Supervisors. As to these highways, the State Highway Commission has control of the construction and maintenance but the Boards of Supervisors have power to exercise all control and supervision over these highways, not embraced within the meaning of the words "construction and maintenance." In other words, reasonable police and traffic regulation of the Board of Supervisors will apply not only to county roads but also to State Highways. In *Merchants Transfer Co. vs. Gates* (Arkansas 1929) it was held that although streets are

made a part of the State Highway system, they are still subject to regulation by cities or other governmental agencies. In Mississippi, a municipality may not interfere with the construction and maintenance of a State Highway through it *(Ridgeland vs. Madison County,* (Mississippi 1929) 122 Southern 753), but the Arkansas decisions above cited show that there is no necessary conflict between state regulation for certain purposes at the same time with municipal or county regulation for other purposes.

In view of the foregoing constitutional powers of the Boards of Supervisors over their roads and the constitutional powers of the Legislature, acting through the Railroad Commission over the regulation of common carriers, it seems clear that the State Railroad Commission may issue permits to operate busses over highways within the State of Mississippi but that such bus lines must conform not only to regulations of the Railroad Commission, and to municipal ordinances as provided in the statute, but also to all reasonable ordinances and regulations of the Boards of Supervisors within each county.

While the Boards of Supervisors have the power to regulate the use of highways, they may not, under the pretense of regulation, forbid the use of the highways to any person or class of persons. See *Arlington vs. Lillard* (Texas 1927) 294 S. W. 829. *Fort Worth vs. Lillard* (Texas 1927) 294 S. W. 831.

It is well known that the size and width of busses generally in use has increased in recent years so as to make them a serious problem on the public roads. Many busses now in use weigh more than 20,000 pounds. Some of them are so large that it is difficult for them to pass on some of our state highways without compelling smaller vehicles to get in the ditch. Some of the counties as above stated have passed regulations forbidding the use of the highways by vehicles weighing more than certain amounts, which are much lower than the weight of the average common carrier bus. Probably ordinances of the Boards of Supervisors, which are unreasonable in view of present practices and conditions, would be held invalid. The Supreme Court of Mississippi in *Ridgeland vs. Madison County* (Mississippi 1929), 122 Southern 753, has indicated an intention to require road laws to be in line with modern conditions. The language used by the court in that case seems somewhat broader than was necessary for the facts involved when they say that "Roads and streets were then of little more

than local concern. But the advent of automobiles and the requirements of modern conditions brought about by the general use of that new means of transportation have worked a gradual readjustment of our laws to meet the new conditions. These readjustments have been cautiously advanced, but nevertheless have been definite.''

It seems probably that the court would hold that regulations enacted by the Boards of Supervisors which were, at the time enacted, reasonable, but have since become unreasonable because of changed conditions, are now invalid. But on the other hand there seems no reason to assume that the Boards of Supervisors have lost their power to enact reasonable regulations governing the use of public highways in their respective counties especially when such regulations have a reasonable relation to the protection of the road itself such as regulations governing weight and speed.

In conclusion, it seems that the true line of division between the powers of the Railroad Commission with reference to bus lines which are common carriers, and the powers of the Supervisors, are suggested in the terms of the Statute which says that the Commission shall have power to regulate the relations between the bus lines and the traveling public (meaning the public that travels on common carriers). The Boards of Supervisors may regulate the relations between the bus lines and the roads over which they operate. Those are very definite fields of regulation and there is no necessary conflict between them. The bus lines must comply with the regulations of the Boards of Supervisors within their sphere as well as the regulations of the State Railroad Commission within its sphere.

MISSISSIPPI'S COMPACT WITH ARKANSAS

By Ward Allen*

References, more frequent than usual, have appeared lately regarding the compact clause of the Federal Constitution. It is probable that but few Mississippians know that their own State is a party to a compact with another state.

The compact was made during the administration of Governor Noel. Hon. W. D. Anderson, now a judge of the Supreme Court of Mississippi, was then a senator from the 38th Senatorial District, composed of the counties of Lee, Monroe, and Itawamba. For some years, there had been a great deal of discussion, chiefly among state officials and members of the legislature, of the problem presented of criminal jurisdiction on the waters of the Mississippi River. The line between the State of Mississippi on the east and Arkansas and Louisiana on the west is, of course, the thalweg or thread of the river. It is settled law that such a line changes with gradual erosion, but in the case of a sudden evulsion the line remains where it was before the evulsion. The problem presented was caused in part by gradual changes in the line, it frequently being difficult to ascertain just where the line was. At other times, even when the line was known, no one could be sure as to which side of the line a crime was committed. Persons charged with crime were thus frequently able to raise by their evidence a reasonable doubt as to which state they were in when the crime was committed, the usual result being that the guilty escaped.

Judge Anderson was chairman of the Judiciay Committee, and was asked by Governor Noel to provide, if possible, a solution of the problem. After careful investigation, he advised the Governor that in his opinion a remedy might be had under the third clause of Section 10 of Article I of the Federal Constitution, known as the *compact clause,* and which reads as follows:

"3. No state shall, without the consent of Congress, lay any duty or tonnage, keep troops, or ships of war in time of peace, **enter into any compact or agreement with another state, or with a foreign power,** or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

The result of Judge Anderson's advice was that Honorable George Butler, then Assistant Attorney General, and

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now of the law firm of Butler & Snow in Jackson, was asked to prepare a bill or bills to cover the situation. These were prepared by Mr. Butler, and were introduced by Judge Anderson at the 1910 session of the Legislature as Senate Bills Numbers 262 and 263. Both bills passed the Senate and House, were signed by the Governor, and appear as Chapters 140 and 141 of the Laws of 1910, Sections 1211 to 1216 inclusive, Hemingway's Code of 1927.

For the sake of brevity these Acts are not set out here, but their substance is that the criminal jurisdiction of the State of Mississippi was extended to the west bank of the Mississippi River, Chapter 140 to take effect when the State of Louisiana should pass a similar, reciprocal act, and Chapter 141 to take effect when the State of Arkansas should pass a similar, reciprocal act, the criminal jurisdiction of those states to be extended to the east bank of the Mississippi River. No such act was ever passed by Louisiana, but Arkansas has responded to negotiations by adoption in 1909 of an act carried in Crawford & Moses Digest as Sections 2860, 2861, and 2862.

These acts, of course, could not constitute a valid compact between Mississippi and Arkansas "without the consent of Congress," but this had been attended to. Judge Anderson had been in correspondence with Hon. B. G. Humphreys of Greenville, who then represented the Delta district of the State in the lower house of Congress, and Mr. Humphreys introduced Joint Resolution Number 5, approved January 26, 1909, and which appears as 35 U. S. Stat. at L. 1161, and reads as follows:

"**Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,** that the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the other such tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offences arising out of the violation of the laws of said States upon the waters of the Mississippi River."

It is to be regretted that the correspondence between Judge Anderson and Congressman Humphreys cannot be

found at this time, as it probably is of interesting historical value.

The result of these acts on the part of the legislatures of Mississippi and Arkansas and of the Congress of the United States is that there is a compact or agreement between the two states, whereby either state can try an offender for a crime committed anywhere between the two states on the waters of the Mississippi River. The acts have been construed by the Supreme Court of Arkansas in the cases of *Means vs. State,* 118 Ark. 362, and *Padgett vs. State,* 151 Ark. 290, and by the Supreme Court of Mississippi in the case of *State vs. Cunningham,* 102 Miss. 237, 59 So. 76. The opinion in the Cunningham case was written by Judge Mayes, and it was tried in the lower court before the late Judge Sam C. Cook. When the case came up on appeal Judge Cook had become a member of the Supreme Court, and in a short concurring opinion he bowed gracefully to the "unanswerable logic" of Judge Mayes in reversing what he (Judge Cook) had held in the court below. The opinion in the Cunningham case in submitted as a model for any judge of an appellate court who wishes to improve the logical arrangement and clarity of expression of his written opinions.

As already stated, Louisiana failed to respond with a reciprocal act, so there is no compact between Mississippi and Louisiana. Arkansas, however, was more fortunate with Tennessee. The Arkansas act (C. & M. Dig. Secs. 2860-61-62) already referred to includes Tennessee within its scope, as well as Mississippi. Tennessee responded in 1915 with Chapter 123, Public Acts of Tennessee, for 1915, which act includes Missouri as well as Arkansas within its scope. The Tennessee-Arkansas compact was consented to by Congress under 35 Stat. at L. 1163. Under the enabling act by which Missouri was admitted to the Union, it was provided that any river bordering on said State which formed a common boundary line between the State of Missouri and any other state, should be common to both states. The enabling act of Arkansas contains a similar provision, but only in so far as the boundary line between Arkansas and Missouri is concerned.[1] Neither the Tennessee enabling statute,[2] nor the Mississippi enabling statute[3] contains any such provision.

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1 *Brown v. State,* 109 Ark. 373.
2 1 U. S. Stat. at L. 489.
3 3 U. S. Stat. at L. 348.

In view of the provisions of the enabling acts of Missouri and Arkansas, and possibly of other states, it appears that the extension of the criminal jurisdiction of a state beyond its ordinary territorial limits has been accomplished in other ways than the compact clause of the Constitution. The compact clause has been used to settle various kinds of controversies between states, boundary disputes seeming to be by far the most numerous. At present the clause is being invoked to settle controversies between a number of the western states over rights to the waters of the Colorado and other rivers. All the lists which the writer has found, purporting to show the instances of compacts between the states, are admittedly incomplete, or have been shown to be incomplete. In an article by Messrs. Felix Frankfurter and James M. Landis, entitled *A Study in Interstate Adjustments,* appearing in Volume XXXIV, Number 7 of the Yale Law Review, in a footnote at page 735, it is said: "The lack of a scientific index to Federal legislation does not make it surprising that all these lists are incomplete." In the footnote just referred to Messrs. Frankfurter and Landis say that in an appendix to their article they are attempting a comprehensive list of the compacts consented to by Congress. Those gentlemen list the Tennessee-Arkansas agreement, heretofore referred to in this paper, but say that "No evidence of action by Tennessee has been found." It is submitted that Chapter 123, Public Acts of Tennessee for 1915, hereinabove mentioned, is probably the Tennessee act which they failed to find.

It is probable that the Mississippi-Arkansas compact is the third instance wherein the criminal jurisdiction of a state has been extended through exercise of the compact clause of the Constitution. The first appears to have been between New York and New Jersey, to which assent of Congress was given by 4 Stat. at L. 708. That was in 1833, and not until 1905 was the clause again called into use to enlarge criminal jurisdiction, when New Jersey and Delaware entered into an agreement dealing with the jurisdiction and service of process in penal causes over the Delaware River. The assent of Congress to the New Jersey-Delaware compact may be found in 34 Stat. at L. 858. It is certain that when Judge Anderson and Mr. Butler were working on the Mississippi-Arkansas compact they were exploring a comparatively untried field.

Much speculation could be indulged in as to further profitable use of the compact clause. If the western states

can get their water controversies settled in this way, much will be accomplished. One wonders what devices under the clause might not be worked out in state line towns such as Texarkana, Bristol, St. Louis and East St. Louis. The Mississippi-Arkansas compact has been singularly effective, crime on the river having been greatly reduced. How far can the states go under the clause, either with or without the consent of Congress, and are not municipalities subdivisions of the state in a sense that they could make compacts under the clause? A great deal of profitable time might be spent in a study of this question, interesting as a study, and probably productive of many beneficial results in the struggle to settle controversies between the states, a problem inherent in every federal structure. An agreement between the states is prohibited in any event by the Federal Constitution, if it partakes of the nature of, or rises to the dignity of a treaty, an alliance, or a confederation.[4] But just what is a treaty, which is absolutely prohibited, as compared with an agreement or compact, such as are permitted under consent of Congress? It has been suggested that there are a considerable number of agreements which might be made between states, which do not require the consent of Congress at all:

"There are many matters in which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York, which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way . . . . . If then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply? . . . .

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political

4 Cons. of U. S. Art. I, Sec. 10, Cl. 1.

power in the States, which might encroach upon or interfere with the just supremacy of the United States . . . . . ." [5]

Hon. A. A. Bruce, formerly Chief Justice, Supreme Court of North Dakota, has said:

"Perhaps the true rule is that all compacts or agreements which increase or decrease political power are void, but that all others are voidable merely, at the option of the national government, and that a consent thereto may be inferred from silence and acquiescence." [6]

Without presuming to criticize either of the eminent authorities just quoted, may it not be said that compacts and agreements which increase or decrease political power approach the nature of a treaty, which is prohibited by the Constitution in any event? The question seems to be—just how far can the states go without the consent of Congress; and again—just how far can they go even with the consent of Congress, because what is a treaty, an alliance, or a confederation? The problem is interesting in these days of "crime waves," prohibition, utility regulation, and taxation.

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[5] Mr. Justice Field in *Virginia v. Tennessee*, 148 U. S. 503 (a boundary dispute.)

[6] Minnesota Law Review, Vol. 2, No. 7, p. 516.

AGRARIAN LEGISLATION IN THE STATE OF MISSISSIPPI*

By A. B. Butts†

I.

It is perhaps not incorrect to say that agriculture is the most essential of all industries. A competent observer[1] has called attention to the fact that "the prosperity and progress of the American rural industries are due partly to the bounty of Nature, partly to the action of the American Government and people."

There have been various types of attempts, direct and indirect, to solve the farmer's problems by legislation. The progress of rural communities is advanced or retarded by legislation that is not essentially agrarian. The Final Report of the United States Industrial Commission of 1902[2] stated that—

"Agriculture is the fundamental, if not the most important, industry of any people, and should receive as much direct benefit from legislation as any other industry. Agriculturists are indirectly, but nevertheless vitally, interested in equitable tax laws and in legislation intended to prevent monopoly, either in manufacturing or in transportation. As consumers of manufactures and producers of farm products, they are doubly affected by unequal or exorbitant freight charges. Their interests will be best conserved, therefore, by low uniform rates for the transportation of freight and by legislation which will promote fair competition in manufactures . . . ."

The first permanent settlement in the present State of Mississippi was made at Biloxi on February 6, 1699, by Pierre le Moyne D'Iberville, a French Canadian officer who had been chosen by the French Government to colonize Louisiana.[3] Under the French there was scant agricultural progress.

Later, holding grants of land from the English Government, settlers from Virginia, Georgia, and the Carolinas moved into the State. They established the plantation sys-

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1 J. Ellis Barker, Economic Statesmanship, p. 90 (London, 1918).

2 Quoted by Barker, p. 90.

3 B. F. French, Historical Collections of Louisiana, V. III, p. 13.

tem. They brought with them their own stock, slaves, and elementary types of farm implements then in use. They came as farmers, not as "mineral prospectors" and speculators, as had been the case with the French settlers.[4] With the outbreak of the Revolutionary War many Tories came to the State. Among them were many well-educated men of character and with substantial means. Cotton production under the slave-plantation plan now had its beginning.[5]

Although at this early time in the agricultural development of Mississippi large farms predominated, smaller farms were established by the non-slave owners in the "piney woods" district back from the Mississippi River. Around Natchez the plantations had been established by the slave-owners; in the interior—back from the river—were found the small farmers: these were the two agricultural classes prior to the Civil War. The latter class was a "retarding influence on agricultural development, especially in connection with agricultural legislation which depended on the ballot of the citizenship of the state."[6] The small farms had had their beginning as a result of the privilege of homesteading 160 acres of land.

There was very little land-lord and tenant farming in the State prior to the Civil War. When free labor replaced slave-labor three general methods of operating farms developed: the rent plan, the wages plan, the share plan (share-cropping). The "farm problem" in this period revolved around the "labor problem." In 1820 out of a population of 75,448 there were engaged in agriculture 22,033 persons;[7] in 1840, 139,720 out of a population of 337,017;[8] in 1860, there were 212,622 persons engaged in agriculture.[9]

The State of Mississippi has always been essentially agricultural in its general economy. In such a state it would be expected that evidence of direct state participation in agricultural pursuits would be found in the early public statutes. Such is the case. Under the provisions of an act approved January 27, 1841, entitled "An act to promote industry, and for the encouragement of agriculture in the

4 D'Iberville was instructed "to breed the buffalo, to seek for pearls, to examine the wild mulberry with the view to silk; the timber for shipbuilding, and to seek for mines." Claiborne, Mississippi as a Province, Territory, and State, p. 27.

5 Ibid, pp. 114-115.

6 Ronald J. Slay, The Development of the Teaching of Agriculture in Mississippi, p. 17. (Teachers College, Columbia University, 1928.)

7 U. S. Census Report, 1820, p. 29.

8 U. S. Census Report, 1840, p. 227.

9 Slay, R. J., table, pp. 20-21.

State of Mississippi," a State Agricultural Society, and auxiliary County Agricultural Societies were established.[10]

As a pioneer piece of legislation for the promotion and protection of agricultural pursuits in the State, this statute is worthy of note. In the introduction to the statute it was observed that to encourage, by every legitimate means, such pursuits among its citizens as tend to increase substantial prosperity "is the highest privilege and most sacred duty of a state legislature;" that "it is on the pursuit of an efficient system of agricultural employment that every people is dependent for the abundance and cheapness of the necessaries and luxuries of life, which constitute the surest evidence of a prosperous community;" and that "by a concurrence of unfortunate circumstances, this vital branch of individual and national wealth and happiness is greatly depressed and paralyzed among us, and, if ever, should now receive the fostering aid and encouragement of the people's representatives."[11]

Each county in the State—at that time fifty-nine—was constituted an "Auxiliary Agricultural Society," and any free-holder of the State could become a member by the payment into the county treasury of five dollars. Each county organization was called upon to elect a president, two vice-presidents, a secretary, and a committee of five members for the purpose of awarding premiums, called the "Premium Committee." The county treasurer of each county was designated to serve as treasurer of the county agricultural society.

The State Agricultural Society was established "to be composed of one member from each auxiliary county society, who shall elect annually ten local members, all of whom shall elect a president and five vice-presidents." The Secretary of State and the State Treasurer were made secretary and treasurer, ex-officio, respectively, of the State Agricultural Society.[12]

The county societies were required to pay twenty per cent of their entire annual receipts into the state treasury, to the credit of the State Agricultural Society, upon the payment of which the auditor was required to issue his warrant in favor of the Society for an amount equal to one-half of the total amount paid into the treasury by the various county societies. This constituted the funds of the State

10 Hutchinson's Mississippi Code, 1798-1848, Ch. 6, Art. 11, pp. 145-147.
11 Hutchinson's Mississippi Code, 1798-1848, p. 145.
12 Ibid., p. 145, Sec. 5.

Agricultural Society, perhaps the first direct state appropriation for agricultural purposes.

The activities of the state organization and the several county organizations may best be seen by quoting from the law concerning the way in which the funds of the two societies were to be appropriated.

Article 7 of the statute read:[13]

"The State Agricultural Society shall, at its discretion, appropriate its means as follows: To defray the necessary expenses of maintaining a correspondence with the county societies, and other institutions and persons abroad and at home; to the procurement and dissemination of useful information on all the subjects connected with agriculture, industry and economy; in the purchase of books, pamphlets, maps, charts, and specimens of skill and ingenuity upon all subjects connected with agriculture, the production of the earth, or all the animal creation; to promote the circulation of agricultural newspapers in this state; to the printing and disseminating documents upon agricultural subjects; to institute inquiry and research into the subjects connected with agriculture; and, generally, to cause all practical information calculated to advance agricultural and economical science, to be embodied for general use, and communicated to the citizens of this state."

The ambitions of the local societies were scarcely less inclusive than those of the central body. The law required the funds of the county associations should be appropriated as follows:[14]

"To defray the expenses of correspondence; to the payment of contributors to agricultural journals on agricultural subjects; to promote excellence in tilling land; to reward the producers of rare and extraordinary results from the cultivation of the soil; to the encouragement of importations from abroad, and from other states, of improved seeds, plant, and other vegetable production suitable to our climate; to encourage importations and improvements in horses, asses, cattle, sheep, hogs, and other live stock, of approved qualities; to encourage the culture of the grape, and the making of wine; to inspire rivalship in raising fine fruits of all kinds; to encourage the raising of silk, and making silk thread and cloth; to encourage the manufacture of woolen and cotton yarns and cloths; to encourage and patronize the improvement and invention of labor-saving implements of husbandry; to encourage the culture of rice, tobacco, indigo, and other articles of consumption; to encourage domestic industry in weaving, spinning, knitting, sewing, and such other exertions of skill as are calculated to promote the resources, and develop the means, of the State of Mississippi."

13 Hutchinson's Mississippi Code, 1798-1848, p. 146.
14 Ibid., p. 146, Sec. 8.

Indicating an additional activity of the county societies the statute authorized each of these organizations to acquire and hold to an amount not exceeding forty acres as a place for holding fairs.

The president of each county society was required to make an annual report to the president of the state society which should contain "substantially and specifically the state of agriculture and economy of the county; the improvements made and being made; an estimate of the probable profits of the different branches of agriculture; with such other suggestions and reflections as may be deemed useful and interesting to agriculture."[15] The state society prepared a digest of the various county reports, supplemented by any additional suggestions deemed useful and proper.

Apparently very little of practical worth was accomplished under this early attempt to promote agriculture by legislation. This does not mean, however, that this act of the legislature was wholly without importance: it did indicate that the people were awake to the fact that some type of concerted effort on the part of the people might lead to better conditions in the agricultural life of the state. In 1857, there was a second attempt to accomplish by legislation some improvement of the agricultural industry in the state.[16] Again, the immediate results were of slim importance.

In 1859, there existed thirty county agricultural organizations, and there were held twenty-one county fairs. In that year a total of $7,000 was appropriated by the State Legislature for fair grounds, where were exhibited types of farm products of the State. These educational efforts were, no doubt, of some benefit to the farming interests of the State.

So long as new lands could be occupied at will, there was little reason for attempts to improve the soil or for other types of scientific farming. And at this early time there were no efforts on the part of the farming classes to cooperate on the "business side of farming"—in the marketing of the products of the farm.

The legislature of 1850 provided for an Agricultural and Geological Survey of the State.[17] In 1854 provision

15 Ibid., p. 147, Sec. 10.
16 Laws of Mississippi, 1857, pp. 44-51.
17 Laws of Mississippi, 1850, pp. 127-128.

was made for the printing of the report of this survey.[18] This was repeated in 1857[19] and in 1866.[20]

The third Constitution of the State provided for the office of Commissioner of Immigration and Agriculture. Section 23 of the Constitution of 1869 stated that "there shall be a Commissioner of Immigration and Agriculture, who shall be elected by the Legislature on joint ballot, who shall hold his office for the term of four years unless sooner removed by law."[21]

The decade 1870-1880 saw enacted a few miscellaneous statutes in the interest of agriculture. An act to encourage agricultural and mechanical interests and appropriating $4500 for fairs;[22] a statutory exemption from taxation of wool grown in the state and woolen goods manufactured locally, and the imposition of a penalty for trading in foreign materials without a license;[23] an act for the benefit of homesteaders, granting 160 acres of public land at five cents an acre to the head of any family who had resided for four years within the state and who had cultivated the land for two consecutive years;[24] an act to encourage the growing of grapes and the making and selling of wines, including penalties for adulterating the wines, and providing for inspection;[25] an act incorporating the Planters, Manufacturers, and Mechanics Fair Association for the encouragement of the growing of better farm products[26]—all these enactments gave evidence of a quickened interest in the agricultural development of the State. Members of the Legislature were no doubt not unmindful of the fact that the majority of the voters were directly or indirectly engaged in agricultural pursuits.

During this decade too there were organized several farmers' clubs. Although the farmers' organizations had for their purpose the general betterment of agricultural conditions, they did not seem to have objectives that were definite enough to give promise of distinct accomplishments. An exception, however, is found in the fact that there was a definite purpose to establish agricultural schools, and this desire is found as a part of the program

18 Laws of Mississippi, 1854, pp. 148-150.
19 Laws of Mississippi, 1857, p. 113.
20 Laws of Mississippi, 1866-7, p. 497.
21 Art. XII, Sec. 23, Const. of Miss., 1869.
22 Laws of Mississippi, 1872, pp. 140-141.
23 Ibid.
24 Laws of Mississippi, 1873, p. 62.
25 Laws of Mississippi, 1877, pp. 90-91.
26 Laws of Mississippi, 1877, p. 220.

of what is said to be the first farmers' organization in Mississippi.[27] A State Grange was organized at Rienzi on March 15, 1872, having for its purpose the establishment of better economic conditions for the farmers and the encouragement of agricultural schools. The Grange was instrumental in the establishment of the Agricultural and Mechanical College of the State.[28]

II.

In 1878, an agricultural school was established in Coahoma County by an act of the Legislature; this school was known as the Grange Agricultural School.[29] The Farmers Alliance, a secret order, proposing to improve the economic conditions of the farmer, existed from 1888 to 1892. This organization was short lived; it abandoned its original purpose, became involved in politics to the extent that it was largely responsible for the birth of the Populist Party in the State, and accomplished little for agriculture.[30] The Agricultural Wheel was another organization of this type, and it finally merged with the Alliance.

An association of farmers known as the Fruit Growers and Gardeners' Association of South Mississippi was incorporated by act of the Legislature in 1878. The next year saw the establishment of the Mississippi Valley Cotton Planters' Association which had for its purpose "the promotion of diversity of crops and the encouragement of immigration, and the breeding of livestock."

The interest in the development of better agriculture in the State had by 1880 taken a very definite trend toward accomplishing results through the establishment of schools for the study and teaching of agricultural subjects.

The Morrill Land-grant Act, passed by Congress, became a law on July 2, 1862. This act was entitled "An Act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts."[31] Each state was granted thirty thousand acres of land for each senator and representative in the Congress in 1860. At that time Mississippi had five congressmen, and so on the basis of the seven members of the two branches of Congress from the State, the allotment to

27 Slay, R. J., The Development of the Teaching of Agr. in Miss., p. 29.
28 See White, J. M., History of the Agricultural and Mechanical College, Publications of the Miss. Historical Soc., Vol. 5.
29 Laws of Mississippi, 1878, p. 641.
30 Slay, R. J., p. 30; Rowland, Ency. Miss. History, V. I, p. 55.
31 U. S. Statutes at Large, Ch. CXXX, p. 503.

Mississippi would amount to 210,000 acres of land. The State Legislature, as soon after the close of the Civil War as practicable, moved to meet the requirements of the National Government in order to take advantage of the provisions of the Morrill Act. In 1872, therefore, there was established at the State University a department of agriculture; the department was discontinued in 1877.[32]

The State Grange had been very active since the passage by Congress of the Morrill Act for the establishment of a separate college for the teaching of agriculture. After the failure of an earlier attempt, the Legislature in 1878 passed an act establishing the Mississippi Agricultural and Mechanical College,[33] and at the same time established an agricultural college for negroes, the Alcorn Agricultural and Mechanical College. The Legislature appropriated $50,000 in 1880 and $35,000 in 1881 for the purposes of the Agricultural and Mechanical College.[34]

The Morrill Act in 1862;[35] the Hatch Act, establishing agricultural experiment stations, in 1887;[36] and other acts of Congress in the interest of agriculture gave an added impetus to the states in their encouragement of agricultural development through legislative means. The establishment of the Agricultural and Mechanical College gave a definite direction and furnished a trained leadership for progressive agriculture in the State.

Unlike the experience during the five years that the Department of Agriculture existed at the State University, the work of the new college of agriculture was successful from the very beginning. Supplementing the work of teaching in the college, the experiment station, and later the agricultural extension work came very early to play a large and important part in the development of the agricultural and industrial life of the State.

Just prior to the time of the establishment of the Agricultural and Mechanical College, the legislative attention in the State, so far as agricultural development was concerned, had been given to granting charters of incorporation to various associations, usually joint-stock companies,

32 Mississippi Senate Journal (Joint Resolution), 1866, p. 95; House Journal, 1872, p. 303; Laws of Miss., 1871, pp. 704-720. See, Slay, R. J., Chs. 5 and 6, pp. 41-68.

33 Laws of Mississippi, 1878, Ch. XIX, pp. 118-123, approved Feb. 28, 1878.

34 Laws of Mississippi, 1880, p. 198.

35 U. S. Statutes at Large, Ch. CXXX, p. 503.

36 U. S. Statutory Laws, 1887, p. 440; Mississippi act accepting, Laws of Mississippi, 1888, p. 54.

that had for their purpose, as stated in their charters, "the promotion of agriculture, manufactures, and mechanical arts."[37]

In 1879, the Supreme Court of the United States was called upon to render a decision in a case[38] arising from a statute which had been passed by the Legislature of the State of Mississippi in 1867, which statute purported to be enacted "in the interest of agriculture," but which was merely a legislative grant of a charter of incorporation for a lottery business. Growing out of a piece of "agrarian" legislation, the decision in *Stone vs. Mississippi* is not without interest.

The Legislature of Mississippi passed an act, approved February 16, 1867, entitled "An Act incorporating the Mississippi Agricultural and Manufacturing Aid Society." Its provisions, in part, were as follows:[39]

"The corporation shall have power to receive subscriptions, and sell and dispose of certificates of subscriptions which shall entitle the holders thereof to any articles that may be awarded to them, and the distribution of the awards shall entitle the holders thereof to any articles that may be awarded to them, and the distribution of the awards shall be fairly made in public, after advertising, by the casting of lots, or by lot, chance, or otherwise, in such manner as shall be directed by the by-laws of said corporation; . . . . and the said corporation shall have power to offer premiums or prizes in money, for the best essays on agriculture, manufactures, and education, written by a citizen of Mississippi, or to the most deserving works of art executed by citizens of Mississippi, or the most useful inventions in mechanics, science, or art, made by citizens of Mississippi."

Section 8 of the act required the corporation to pay, before the commencement of business, to the treasurer of the State, for the use of the University, the sum of $5,000, and to give bond and security for the annual payment of $1,000, together with one-half per cent on the amount of receipts derived from the sale of certificates.

Section 11 enacted that, as soon as the sum of $100,000 was subscribed, and the sum of $25,000 paid into the capital stock, the company "shall go into operation under their

37 See, Laws of Miss., 1870, pp. 530-531; Laws of 1871, Ch. CCLX, pp. 628-632; Laws of 1871, Ch. CCLIX, p. 627, same, Ch. CCLVI, pp. 632-637; Laws of 1873, Ch. XCVII, pp. 106-107; Laws of 1873, Ch. VIII, p. 29. In the following laws miscellaneous regulations, in the benefit of agriculture, were attempted: Laws of 1867, Ch. CCCCLXV, pp. 569-572; Laws of 1874, Ch. XLVIII, p. 62; Laws of 1875 (called session), Ch. XVII, p. 21.

38 *Stone v. Mississippi*, 101 U. S. 814 (1879).

39 Laws of Mississippi, 1867, Ch. CCLVI, Sec. 6, p. 351.

charter, . . . and that the act of incorporation shall continue and be in force for the space of twenty-five years from its passage."

The Constitution of the State, adopted in convention May 15, 1868, and ratified by the people December 1, 1869, declared that "the legislature shall never authorize any lottery; nor shall the sale of lottery-tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein be sold." The Legislature passed an act, approved July 16, 1870, entitled "An Act enforcing the provisions of the Constitution of the State of Mississippi prohibiting all kinds of lotteries within said State, and making it unlawful to conduct one in this State."[40]

The company did pay into the State Treasury $5,000 for the use of the University, and agreed to pay, and until the commencement of the suit did pay, an annual tax of $1,000 and "one-half of one per cent on the amount of receipts derived from the sale of certificates or tickets."

In the case before the Court the question was whether the State of Mississippi, in its sovereign capacity, did by the charter to the company bind itself irrevocably by a contract to permit the "Mississippi Agricultural, Educational, and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions, and sell and dispose of certificates of subscription which shall entitle the holders thereof to" . . . the articles awarded to them "by the casting of lots, or by lot, chance, or otherwise."

The Supreme Court of the United States, affirming the decision of the State Supreme Court, held that the State had not bound itself in any such manner. The Court observed that the people themselves cannot bargain away the public health or public morals, much less can the Legislature as servants of the people do so.

So here the Court refused to permit the Legislature, "in the name of the promotion of agriculture and industry," to perpetrate upon the people and the State a business that carried with it all the vice of gambling.[41]

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40 Laws of Mississippi, 1870, Ch. LVIII, pp. 144-146.

41 The Court remarked in *Stone v. Mississippi*: "Formerly, when the sources of public revenue were fewer than now lotteries were used in some or all of the states, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not infrequently for educational and religious purposes, but this Court condemned such in *Phalen v. Virginia,* 8 Howard 163, 168.

III.

On March 8, 1882,[42] the Legislature approved an act to organize and regulate the duties of the Department of Immigration and Agriculture, pursuant to the provisions of the Constitution of 1869. In 1906, the name of this Department was changed to the Department of Agriculture and Commerce.[43] This Department has had some attention from the Legislature ever since its creation by the terms of the Constitution of 1869. From time to time its powers have been altered or enlarged, the details of which it will be unnecessary to enumerate.

Until within the past few years, when a new type of agrarian legislation is becoming popular, that is, legislation having to do with the "business side" of farming, or marketing, the attention that has been given to the agricultural life of the State has, in the main, pertained to educational work. This legislation has been of four kinds: (1) that pertaining to schools and colleges; (2) that pertaining to extension work; (3) that pertaining to scientific investigations in agriculture, experimental work; (4) that pertaining to the control of plant and animal diseases.

Mention has already been made of the establishment of the Mississippi Agricultural and Mechanical College, and of the establishment of an agricultural college for Negroes. Soon after the establishment of the Agricultural and Mechanical College efforts commenced to be made to have agricultural subjects included in the curricula of the secondary schools of the State. Some progress was made all along in this direction; but it was not until 1908 and 1910, respectively, when county agricultural high schools and rural consolidated high schools were provided for by legislation that real substantial progress was made in a program of agricultural instruction for secondary schools in the State.

The first legislative act providing for the establishment of county agricultural high schools in Mississippi was passed in 1908.[44] After three or four schools were established and put into operation, in 1909, the Supreme Court of the State declared the act unconstitutional,[45] the Court's decision being based on the ground that the law did not provide equal advantages for the races. The Court said

42 Laws of Mississippi, 1882, Ch. XVIII, pp. 26-32.
43 Laws of Mississippi, 1906, Ch. 103, p. 87.
44 Laws of Mississippi, 1908, Ch. 102, S. B. No. 302, Sections 1-6.
45 *McFarland v. Goins*, 50 So. 493.

Chapter 102 of the laws of 1908 "authorizing a county to establish one agricultural high school for instruction of its white youth alone, and to support it by a tax on all taxable property in the county, is violative of the Fourteenth Amendment of the Constitution of the United States, its necessary effect being to abridge the privileges and immunities of a class of citizens, or deny them the equal protection of the laws."[46] The Legislature, in 1910, passed a new act providing for the establishment of county agricultural high schools, and also passed an act validating the locations of those schools which had been established under the law of 1908. The law of 1910 provided that a county might provide not more than two agricultural high schools, one for white people and one for colored people. The act of 1910, so drafted as to meet the requirements of constitutionality on the point of equal advantages for the races, with amendments by subsequent legislatures, is the law under which the agricultural high schools are now established and maintained.

The rural consolidated schools have in a large measure included agricultural subjects in their curricula. Rapid progress has been made throughout the State, since 1910, in consolidating two or more small rural schools into one larger school, improved highways and the automobile having made the transportation of pupils to and from their homes a practicable matter. The whole question of the teaching of agriculture in secondary schools was given a tremendous impetus by the passage by Congress of the Smith-Hughes Act, February 23, 1917. This act is entitled "An Act to provide for the promotion of vocational education; to provide for cooperation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure." This bill has been a means for great encouragement of the teaching of agriculture, and has brought about greatly improved methods of teaching agriculture in the secondary schools of the State. The Legislature of the State of Mississippi accepted the terms of the Federal Act at the earliest practicable moment.[47] The farm economic problem has been greatly aided by the work of the Agricultural and Mechanical College and the two special types of rural secondary schools which have here been discussed.

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46 Ibid. The case was decided by the Supreme Court of Mississippi, November 2, 1909.

47 Laws of Mississippi, Special Session, 1918, Ch. XXVIII.

The agricultural extension work in the State has been liberally supported by the Federal and State governments, since the commencement of this work in 1906. Over two thirds of the eighty-two counties of the State employ, in cooperation with the Mississippi Agricultural and Mechanical College, and the United States Department of Agriculture, full-time county agricultural and home economics agents. Greater production and better marketing of farm products are largely due to the work of this service.

After the passage of the Hatch Act[48] by Congress, establishing agricultural experiment stations, the Mississippi Legislature immediately took advantage of the terms of the act.[49] After the establishment of the central experiment station in connection with the Agricultural and Mechanical College, branch experiment stations have been established by acts of the Legislature, thus giving an opportunity for experimental work in the various types of soils throughout the State.[50] The agricultural economy of the State has been vastly improved by this governmental aid through legislation.

Then there is the legislation dealing with technical phases of the problem of agriculture. At an early date there was established the office of State Chemist. In 1888, the Legislature passed an act making the Professor of Chemistry in the Mississippi Agricultural and Mechanical College ex-officio State Chemist.[51] By subsequent acts the State Chemist has been given assistant chemists to assist in the regulatory work with which he is charged, and laboratory facilities in the State Laboratory at the Agricultural and Mechanical College have been provided. Fertilizer analyses, food control work, and other chemical analysis work of general concern to the State, and of particular concern to farmers is done in the State Chemical Laboratory.

IV.

By an act, known as the Mississippi Plant Act of 1918, there was created for Mississippi a State Plant Board.[52]

48 24 U. S. Statutory Laws, 1887, p. 440.

49 Laws of Mississippi, 188, p. 440.

50 Laws of Mississippi, 1900, pp. 61-70, branch station at McNeil; Laws of 1904, pp. 114-115, branch station at Stoneville; Laws of 1904, pp. 114-115, branch station at Holly Springs; Laws of 1920, p. 160, branch station at Raymond; Laws of 1918, Ch. 419, removal branch station from McNeil to Poplarville.

51 Laws of Mississippi, 1888, p. 53; Laws 1882, p. 44; Miss. Code, 1906, p. 695.

52 Laws of Mississippi, 1920, Ch. 252; original act, Laws 1918, Ch. 219.

The Board is empowered to conduct such inspections and promulgate and enforce such quarantine regulations as are necessary for the protection of plants and plant products of the State. The State Plant Board has been a powerful factor in the development of the agriculture of the State. The initial appropriation for the work conducted by the State Plant Board was $25,000 for each of the years 1918 and 1919. For the years 1928 and 1929, $125,000 a year was appropriated. The provision of the 1928 appropriation act setting out the purposes for which the money may be spent indicates the services rendered by this agricultural agency. Section one, in part, reads:[53]

". . . . to be used by the State Plant Board to prevent the introduction of, disemination of, and to eradicate citrus canker, sweet potato weevil, pink boll worm of cotton, alfalfa weevil, European corn borer, Argentina ant, foul breed of bees, camphor scale, black rot and stem rot of sweet potatoes, mosaic disease of sugar cane, and other injurious insects, diseases and pests, and to enforce the provisions of the Mississippi Plant act of 1918, as amended in 1920, and the bee disease act of 1920."

The State Geological Survey Commission was established by an act of the Legislature passed in 1906.[54] The work of this Commission has been of valuable assistance to the farmers of the State.

The State Livestock Sanitary Board was established in 1908.[55] Beginning with an annual appropriation for the work of this Board of $2,500, the importance of the work undertaken has been recognized by the Legislature and larger amounts have from year to year been made available for this service to the farmers of the State. For the biennium, 1928 and 1929, the sum of $550,000 was appropriated for the use of the State Live-Stock Sanitary Board "in the work of tick eradication, hog cholera, bovine tuberculosis, and other infectious and contagious diseases of livestock."[56] The act establishing the Live-Stock Sanitary Board has led to a considerable amount of litigation. Farmers have sometimes contested the authority of the officials of the Board to require curative and preventive measures in the handling of livestock; and quarantine

53 Laws of Mississippi, 1928, Ch. 254, p. 333.
54 Laws of Mississippi, 1906, Ch. 111.
55 Laws of Mississippi, 1908, Ch. 41, p. 39.
56 Laws of Mississippi, 1928, Ch. 138, pp. 196-197.

measures have caused court action to be resorted to for the settlement of rights and privileges under the act.[57]

In an agricultural community fence and stock laws have always been looked upon as necessary, and among the earliest laws pertaining to the business of farming this type of regulation is to be found. Such laws find an important place in the present-day statutes of the State of Mississippi.[58] Under these statutes the courts have been called upon to adjudicate disputes involving trespass,[59] pertaining to elections held under local option laws,[60] involving the question of what animals are required to be kept confined,[61] based upon the establishment of fences of county lines,[62] contesting the authority of County Boards of Supervisors to alter stock laws,[63] arising out of the cultivation of crops on unfenced land,[64] and touching upon other such matters.

In recent years the Legislature has shown its concern for agricultural development by the passage of acts "to protect horticulture, fruit growing and truck gardening and to exclude crop pests of all kinds";[65] acts "to require public ginners to mark or stamp each bale of cotton baled by them, and requiring them to keep records of all such marks and stamps for the inspection of the public";[66] acts "to regulate the practice of veterinary surgery";[67] acts pertaining to reforestation programs;[68] acts providing for the regulation of the inspection, sale, and analysis of commercial feeds and feeding stuffs;[69] acts "regulating the sale of and defining agricultural and mixed seeds, requiring their proper

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57 *Abbott v. State*, 106 Miss. 340, 63 So. 667; *Miss. Livestock Sanitary Board v. Williams*, 133 Miss. 98, 97 So. 523; *McMillan v. Livestock Sanitary Board*, 119 Miss. 500, 81 So. 169; *Covington County v. Pickering*, 123 Miss. 20, 85 So. 114; *Byrd v. Welch, Sheriff*, 128 Miss. 839, 91 So. 568; *State v. Pike County*, 133 Miss. 562, 98 So. 101; *Cooper v. Martin*, 141 Miss. 756, 105 So. 740.

58 Hemingway's Mississippi Code, 1927, Vol. 2, Ch. 114, pp. 2384-2394.

59 81 Miss. 25, 62 Miss. 16, 64 Miss. 283, 124 Miss. 41. 125 Miss. 727, 3 Howard 219, 52 Miss. 188, 67 Miss. 243, 85 Miss. 276.

60 128 Miss. 499, 114 Miss. 446.

61 83 Miss. 153.

62 70 Miss. 769, 71 Miss. 153.

63 82 Miss. 709, 99 Miss. 788, 128 Miss. 499.

64 70 Miss. 769, 73 Miss. 343, 77 Miss. 620, 79 Miss. 565, 82 Miss. 143, 85 Miss. 387, 86 Miss. 477, 92 Miss. 223.

65 Hemingway's Mississippi Code, 1927, Vol. 2, Ch. 130.

66 Ibid., Ch. 124; Laws of Miss. 1908, Ch. 132. See, 116 Miss. 398, 138 Miss. 605, 121 Miss. 615, 130 Miss. 63.

67 Laws of Mississippi, 1914, Ch. 130.

68 Laws of Mississippi, 1924, Ch. 329.

69 Laws of Mississippi, 1912, Ch. 139.

labeling, providing for the collection of samples and their examination";[70] and acts providing for the conservation of game and fish.[71]

There is no part of the agricultural industry of the State of Mississippi which has shown quite such rapid development within the past decade as that of the dairying business. With the establishment of creameries, condenseries, and cheese factories in several communities in the State, ready markets were made available, and the production of milk has become an important part of the agricultural development of the State. In 1918, an act was passed for the regulation of dairies and creameries.[72] This act was superseded by a more comprehensive act passed in 1928.[73] This act regulates dairies, creameries, condenseries, cheese factories, milk and cream buying and skimming stations, and ice cream manufacturing plants, and the sale and purchase of milk products in the State.

In 1924, the Legislature enacted a farmers' credit association act, known as the Mississippi Rural Credits Act, the purpose of which is, according to the terms of the statute, "to promote, encourage and assist in the united action of the farmers of the State, through cooperative methods of obtaining for, and extending necessary carrying on and operating and producing monies and credits to the members of the associations contemplated by this act, for a longer period of time and at lower rates of interest than is usually obtainable to farmers engaged in the production of agricultural products. . . ."[74] The same legislature passed another law the purpose of which was to facilitate credit for the farmer; this was "an act to provide for agricultural credit corporations and agricultural credit co-operative associations doing business with the Federal Intermediate Credit Bank of New Orleans, Louisiana."[75]

Uppermost in the discussions and programs of "farm relief" in recent years has been the question of farmers' cooperative associations of one kind or another. "The cooperative movement has been judicially termed 'the most hopeful movement ever inaugurated to obtain justice for

70 Laws of Mississippi, 1924, Ch. 269.

71 Hemingway's Mississippi Code, 1927, Vol. 2, Ch. 122. See, 86 Miss. 210, 98 Miss. 142, 126 Miss. 195, 93 Miss. 846.

72 Laws of Mississippi, 1918, Ch. 191; Hemingway's Miss. Code, Vol. 2, Ch. 106.

73 Laws of Mississippi, 1928, Ch. 296, pp. 379-393; See too, Laws 1928. p. 40, five-year tax exemption on cattle, sheep, goats, and hogs.

74 Laws of Mississippi, 1924, Ch. 271.

75 Laws of Mississippi, 1928, Ch. 272.

and improve the financial condition of farmers and laborers.'[76] An estimate places the number of cooperatives in existence in this country at 12,000 with a membership of 2,700,000.''[77] Quoting further from this writer:[78]

> The co-operative represents an attempt of the farmer to adjust himself to the ways of modern business. He is by trade, by habit, and by tradition a producer rather than a bargainer, a husbandman rather than a trader. The necessity of taking his product to market, exacting the best price he can get, and purchasing a living has been forced upon him by the march of unwilled events. The older America, save for a dotting of towns and an occasional city, was made up of quiet-like, almost self-sufficient, all-but-isolated farms. What was consumed by the household was for the most part raised on the place; whether a family was well or poorly off depended primarily upon hard work, skill, foresight, and the favor of the seasons; the family living was for the most part made rather than bought. But "science," the machine, and engineering converted an aggregation of small, homogeneous, industrial units into a great interlocking industrial system. Since a more efficient farming demanded less labor, a surplus population left the farms for the city; since up-to-date agriculture gave a larger yield, surplus crops had to be marketed. Thus unwittingly the farmer who had been the bulwark of the agricultural regime was dragged into the commercial system; he came to produce "cash crops," to take his pay in "money," and to "buy the goods" on which his family lived. Whether or no, he was converted into a "business man."

Two acts have been passed by the Legislature of the State of Mississippi, both in 1928, having for their purpose the encouragement of farmers' cooperative associations.[79] On April 16, 1928, the act creating the Mississippi Agricultural Service Department was approved.[80] On April 26, 1928, was approved "An Act to provide a simplified and inexpensive method of incorporating and operating agricultural associations and to promote the general welfare of agriculture and to promote co-operative activities in the rendition of service to producers of agricultural products.''[81] The purposes of this act, as set forth in Section 4, are "to promote the general welfare of agriculture; to enable producers of

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76 *Tobacco Growers Co-op. Ass'n. v. Jones,* 185 N. C. 265, at 277, 117 S. E. 174, at 179 (1923). Cited by Professor Hamilton.

77 Professor Walton H. Hamilton of Yale Law School, Yale Law Journal, May, 1929, p. 938, footnote 6.

78 Ibid., pp. 936-937.

79 Laws of Mississippi, 1928, Chs. 122 and 295.

80 Laws of Mississippi, 1928, Ch. 122.

81 Laws of Mississippi, 1928, Ch. 295.

agricultural products in the State of Mississippi to co-operate in the productions, processing, packing, distribution, financing and marketing of agricultural products, and the elimination of speculation and waste therein; to enable such producers to organize incorporated associations without capital stock and not for profit but for service to their members by the organization and operation of such corporations by a simplified and inexpensive procedure for the promotion and accomplishment of such co-operation and the general welfare of agriculture."

Thus it will be noted that the farmer's problem has been the subject of legislative attention in various ways; to what extent his problem has been solved by legislation it is hazardous to say.

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NOTE: The names and addresses of all other officers and committeemen of the Mississippi State Bar Association are contained in the August, 1929, issue of the Journal.

NOTE AND COMMENT

WITH THE UNIVERSITY OF MISSISSIPPI LAW SCHOOL.—With this issue of the Law Journal, the present student board makes its final bow to the readers. We have strived to make our publication one of which we could be justly proud and one through which our subscribers might obtain both benefit and enjoyment, and we trust that we have had at least a measure of success.

The activities of the Law School of the University of Mississippi are not confined alone to the publication of this Journal. Contrarily, they cover a much broader field—such that the members are generally recognized as leaders in all the various phases of University life—and we feel that a short resume of the activities of the School will not be out of place.

The enrollment for the year 1929-1930 has reached 105 members, the largest in the history of the School, most of whom come from the various other departments of the University. However, each session the school receives quite a number of transfer students from other institutions who desire to complete their law work here. The present scholastic requirement for the entrance of students is that they shall have completed at least two years' prerequisite college work.

The faculty at present is made up of four members, all of whom have been very prominent both as practitioners and teachers. Hon. Thomas Charles Kimbrough, Ph. B., LL. B., has been Dean of the Law School for several years. He is the present President of the Mississippi State Bar Association, and through his position and constant contact with the lawyers of the State, he has made every effort to raise the standard for candidates desiring admission to the bar.

Other members of the faculty are Hon. William Hemingway, B. Ph.; Hon. William G. Roberds, A. B., LL. B., and Hon. Robert J. Farley, A. B., LL. B. It is interesting to note here, by way of passing, that from 1867 to 1870, the Hon. L. Q. C. Lamar, one of the most illustrious statesmen the Commonwealth has produced, served as professor of law. At this time there is an effort being made to increase the law faculty to five full time professors. Such an increase has been approved and recommended by Chancellor Alfred Hume, and there is probability that it will take effect in the near future.

During the year the Law School was reinstated in the American Association of Law Schools, having successfully complied with the prescribed requisites of that organization.

At some time during the latter part of April, the School will move into its spacious, new building, construction of which is now nearing completion. The building will be complete and modern in every respect, and one of the finest, from the standpoints of beauty, convenience and equipment, in the entire South. The basement floor includes a workroom, with desks for typewriting; offices for the Law Journal, equipped with typewriters and mime-

ograph machines; a club room, affording a place in which the various organizations of the Law School may meet; a lounge room; and a locker room. The first floor includes two classrooms, an assembly room, offices of the Dean, and two professors' offices. On the second floor will be situated the stack room, where the active working library will be placed, the librarian's office, a large reading room for research work, the Practice Court room, and two professors' offices. The balcony on the second floor will be used for the extended library—that is, as a place for the old and unusual books. The building will cost about $150,000.00, complete.

Thus, from this brief survey, it is indeed apparent that the Law School at the University of Mississippi is thoroughly abreast of the times, and by virtue of its excellent work has gained its seat in the select circle of America's leading law schools.

GEO. H. HILL, JR.

ATTORNEY AND CLIENT—COMMUNICATIONS WHICH ARE PRIVILEGED AND PARAMOUNT EXCEPTIONS.—Very naturally matters which are personal to an attorney are of paramount interest and importance to him, and define, classify, and limit, when his client is involved, his rights, those of his client, and his professional ethics and duties as regards his relation with his client. The importance of the testimony of attorneys has very recently been brought into the foreground by the recent legislative investigations; and it is the purpose of this note to discuss, rather broadly and generally, the rights, immunities, and limitations of privileged communications between attorney and client.

In England, from the time of Bentham, professional communications between attorney and client have been enshrouded and clothed in secrecy, and have received the protection of the courts whenever an attempt has been made to give publicity to such private intercourse. Our own courts have adhered to the same principles, and the reasons for this privilege has been expounded and extolled in several decisions of the Mississippi Supreme Court. Quoting from Mr. Justice Clayton in *Crisler v. Garland* (1848), 19 Miss. 136, the reason is laid down, "The privilege is founded upon a great public policy. It is adopted out of regard for the interest of justice, and from the necessity of free and unrestrained intercourse between counsel and client." And further, Mr. Justice Fisher, in *Parkhurst v. McGraw* (1852), 24 Miss. 134, declares, "If such communications were not protected, no man would dare to consult a professional adviser, with a view to his defense, or the enforcement of his rights."

Our own Court has held that, "the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy," *Lengsfield & Co. v. Richardson & May* (1876), 52 Miss. 443. This is so whether said communications were made prior to, during, or after the termination of the employment, just so the relation of attorney and client existed at the time of the communications. This rule is clarified by quoting from the opinion of Sumrall, C. J. in *Perkins, Adm., etc. v. Guy* (1877), 55 Miss. 153, "Nor does the privilege terminate with the particular business which established the relation. Whether the attorney accepts the employment or not, disclosures made to him expository of the business about which his

services are sought are as much protected if the attorney declines the engagement as if he accepted.'' *Parkhurst v. McGraw, supra.*

That the privilege extends only to professional matters and communications is seen from a review of the case of *Randel v. Yates, et al.*, 48 Miss. 685, where the Court held that, ''An attorney who is requested to prepare a deed or mortgage, no legal advice being required, is not privileged, and may testify as to what comes to his knowledge in connection with such transaction. And when the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed as a scrivener merely to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him, while thus engaged, will not be regarded as privileged.''

Further, in order that the privilege may accrue, the communication must not only be professional but it must also be confidential. In *Perkins, Adm., etc. v. Guy, supra,* our Court has held that a statement made to an attorney, in the presence and at the instance of his client, by a third party, is not a confidential communication as merits the extension of the privilege. This distinction can best be shown by the citation of concrete illustrations. Such privilege does not extend to communications made by a litigant to his attorney for the purpose of being communicated to the adverse party nor to communications made by an attorney to his client at the instance and request of the opposing solicitor or adverse party, for these communications are not confidential. *Richer v. Goldber,* 78 P. Super. Ct. 309; *Kilgo v. Continental Casualty Co.,* (Ark.) 215 S. W. 689; *Keohane v. Keohane,* Cal., 176 Pac. 386. In connection with this distinction, and aside from Code of 1906, section 5013, the Alabama case of *Vacalis v. State,* should be of much present interest as direct authority and as an analagous case in relation to the privilege of attorneys in the recent Mississippi Legislative Investigations conducted by the Anderson Committee. This case holds: A communication between an attorney and a person other than his client or an agent of his client is not privileged, though relating to the client's business; hence an attorney's testimony as to an agreement between him and the state as to immunity from prosecution of his client was not privileged.

When the privilege does exist, it is waivable only by the client. It is the privilege of the client, and the attorney is ethically and dutifully bound to silence, as Justice Fisher says in the case of *Parkhurst v. McGraw, supra,* attorneys ''are not only justified in withholding such matters, but bound to withhold them.'' And, quoting from Sumrall C. J. in *Perkins Adm. v. Guy, supra,* we note, ''It is the privilege of the client that the seal of confidence should not be broken without his consent.'' But it is generally held that the client waives the privilege by becoming a witness and testifying in his own behalf. *Jones v. State* (1887), 65 Miss. 179.

The foregoing is a general dissertation on and digest of the general principles surrounding the privilege, the reasons therefor, and the basis thereof. In the case of *Crisler v. Garland, supra,* our Court has stated that, ''It is better, in our judgment, to adhere to the rule, in a broad and liberal sense, than to weaken its force by exceptions.'' This statement does evidence the inclination and tendency of our own Court, but this is merely obiter dicta—and, from the mass of authority on the question, it is observed that for many

salutary reasons the rule must admit of some minor and broad exceptions, even though the communication be both confidential and professional, and be made during the existence of the relationship of attorney and client. The reasons for the exceptions are largely identical with the reasons for the rule. The test may be broadly, if theoretically, stated that whenever a salutary public policy is best subserved and justice better obtained, the public policy requiring the abrogation of the privilege outweighing that upon which the privilege is founded, then the privilege will be declared non-existent.

Despite some contradictory authority, there is a deviation from the general rule when an attorney's testimony is sought after the death of a testator for whom he drew a will. Briefly stated, the rule is that usually after death of testator, an attorney can testify as to communications made by said deceased. This is to effectuate the intentions of the testator after decease—but of course such professional communications were privileged during the lifetime. *Bradway v. Thompson*, Ark., 214 S. W. 27; In re Healy's Will, Vt., 109 Atl. 19; *Durant v. Whitcher*, Kan., 156 Pac. 739; *Bonta v. Sevier*, Ky., 259 S. W. 703; but the rule is different, *Anderson v. Searles*, N. J., 107 Atl. 429; *Collins v. Collins*, Ohio, 143 N. E. 561.

Now the broadest and most important exception to the rule upholding the privilege is considered. It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise, and for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client. But the difficulty has been to define the boundaries of this limitation. It has not always been kept in mind that the privilege, in its very fundamentals, presupposes what Bentham so drastically censured—the furnishing of legal advice to the culpable client, as well as to the worthy one, i. e., to a client who, if the law were duly enforced, would lose in the litigation. How, then, can the privilege continue to exist at all, if any exception is to be made by which the confidences of the guilty are to be disclosed?

It is possible, of course, to take merely the practical point of view, and declare that the privilege must at least cease to be a cloak for criminal conspiracy, regardless of its logic, and to contrive an arbitrary limit for this exception. But it seems hardly necessary thus to do violence to the theory of the privilege. Looking at the reasons of policy upon which it rests, they appear by their natural limits to end with the same conclusion. They predicate the need of confidence on the part not only of injured persons, but also of those who, being already wrongdoers in part or all of their cause, are seeking legal advice suitable for their plight. The confidences of such persons may legitimately be protected, wrongdoers though they have been, because the element of wrong is not always found separated from an element of right; because, even when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress; and because the legal adviser must not habitually be placed in the position of informer. But these reasons all cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. From that point onwards, no protection is called for by any of these considerations. See Wigmore on Evidence, Vol. 5, No. 2298, p. 34. By way of elaboration, the rule is stated very concisely in 40 Cyc, p. 2373, the privilege being held not to "extend to communications respecting proposed infractions of the law, and

so there is no privilege as to communications made in contemplation of the future commission of crime, or perpetration of a fraud, in which, or in avoiding the consequences of which, the client asks the advice or assistance of the attorney. But communications in respect to an alleged crime or fraud, made after the act or transaction is finished, are privileged."

To cumulatively submit more substantial authority on this point, the masterful opinion of Green V. C. in the leading case of *Mathews v. Hoagland,* 48 N. J. Eq. 455, 21 Atl. 1054, is partially quoted, "In order that the rule may apply, there must be both professional confidence and professional employment; but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. As I understand the case stated: If the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it, there is no privilege for it is no part of an attorney's duty to assist in crime; he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the co-operation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy, which, on its accomplishment by the commission of overt act, becomes criminal and an indictable offence."

To the inquiring mind it becomes noticeable that a situation might arise, in the above case, whereby the attorney may be equally as guilty of crime as his client, or equally as guilty in fraud which constitutes crime, to such an extent that his testimony might be self-incriminating. In absence of statutory regulations, the general rule in this regard may be safely stated: A witness may be compelled to testify as to his knowledge of the presence or participation of others in a criminal act, notwithstanding the fact that he himself may have participated in the same act. A witness cannot be compelled to testify as to criminal acts done in his presence which could not have been done without his concurrence and assent. Enc. of Evidence, Vol. 14, p. 651, *Wheatley v. State,* Ga., 39 S. E. 877; Ex parte Lindo, 1 Cranch C. C. 445, 15 Fed. Cas. No. 8, 364; *LaFountaine v. Southern Underwriters' Assn.,* 83 N. C., 132; Ex parte Bushett, 106 Mo. 602.

Where a fraudulent conveyance is sought to be made by the client, and the attorney is apprised of the fact, the present Mississippi rule, there being no recent cases involving the question, is that an attorney is not permitted to disclose communications made by the party, to the effect that his object was to make a fraudulent conveyence. *Crisler v. Garland, supra,* 11 S. & M. 138. But there is much authority to the contrary, and in *Covenay v. Tannahhill,* 1 Hill 33, a leading case, the privilege was held not to cover the execution of an instrument in fraud of creditors.

This note, without an extensive citation of authority, does contain a review of every Mississippi adjudication on the subject to date—and, further,

it contains, in the general treatment and principles laid down by the writer, an opinion of what is, by authority, and what should be, by reason, the best rules for the protection and aid of both attorney and client, considered in the light of the welfare of the public, generally.

LANDMAN TELLER.

THE EXISTENCE OF A DE JURE OFFICE AS A CONDITION OF A DE FACTO OFFICER.—An officer de facto has been defined as one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. The de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interest of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers.

In pursuance of the de facto doctrine, the courts have been uniform in asserting that if an office is legally in existence, the standing of the incumbent as a de facto officer is not impaired by the fact that the statute directing the manner in which it is to be filled, or the law providing for the election of the officer, is unconstitutional. However, a much more interesting and controverted question is presented by the proposition as to whether or not it is possible to have a de facto officer in the absence of any de jure office. The authorities on this phase of the law are in an apparently irreconciliable conflict.

Generally, there must be an existing office, or office de jure, before there can be an officer de facto. This, the general doctrine, is clearly declared and expounded by the Supreme Court of the United States in *Norton v. Shelby County*, (118 U. S. 425), coming from the Supreme Court of Tennessee. The U. S. Supreme Court, following the decision of the Tennessee Court, applied the doctrine, that the existence of a de jure office is a condition of a de facto officer, to the acts of persons done before the unconstitutionality of the statute, purporting to create the offices which they asumed to fill, had been judicially declared unconstitutional. The Court specifically held that the members of a county board of commissioners, purporting to have been created by an act which was eventually condemned as unconstitutional, were not de facto officers so as to uphold bonds of the county issued by them before the illegality of the statute purporting to create the board had been decided upon by the court. In this case the bonds were issued pending an appeal from a decision of the lower court of the state upholding the statute. The court, speaking through Mr. Justice Field, utterly repudiated the contention that a legislative act, although unconstitutional, may in terms create an office which will make its incumbent a de facto officer. Quoting:

"An unconstitutional act is not a law; it confers no right, it impresses no duties, it creates no office; it is in legal contemplation as inoperative as though it had never been passed. While acts of a de facto incumbent of an office lawfully created by law and existing are often held to be binding for reasons of public policy, the acts of a person assuming to fill and perform the duties of an office which does not exist de jure can have no validity whatever in law."

It has been asserted that the reasons which require the acts of a de facto officer to be upheld as far as the rights of the public and third persons

are concerned do not apply to support the necessity of recognizing an office as existing de facto. Such an office not having been created and not having been adopted into the organized system of government, its displacement does not disturb the harmony of the organization. (In re Norton, 64 Kan. 842; 68 Pac. 639.)

The doctrine was applied in *People v. Toal,* (85 Cal. 333; 24 Pac. 603), holding, that the police court of a city having been illegally established because the legislature had attempted to create the court by resolution instead of a bill regularly passed—the incumbent was not a de facto officer. In view of the fact that there are cases which hold that the doctrine under discussion does not apply to an office having a potential existence, it is notable here that the doctrine was nevertheless applied, although it was clearly within the power of the legislature to establish such a court in a proper manner under the constitution of California.

In *Hildreth v. McIntire* (19 Am. Dec. 61), the Kentucky Supreme Court applied the doctrine, ruling that the incumbents of the office of judge and clerk of a Court of Appeals, so-called, which the legislature had attempted to create in place of the Court of Appeals ordained by the Constitution, which latter court it undertook to abolish, were not de facto officers. The court said:

"There cannot be more than one court of appeals in Kentucky as long as the constitution shall exist and that must necessarily be a court 'de jure.' There might be under our constitution, as there has been, de facto officers. But there never was and never can be, under the present constitution, a de facto office." And the court held that the gentlemen who had acted as judge and clerk of the legislative tribunal were not incumbents of a de jure office, nor de facto officers, and that their acts as such were null and void.

Consequently, under this view, an office attempted to be created by an unconstitutional law has no existence, and is without any validity; and any person attempting to fill such a pretended office, whether by appointment, election, or otherwise, is a usurper, whose acts are absolutely null and void. (See 22 R. C. L., page 592-593. Also, *Norton v. Shelby County, supra; King Lumber Co. v. Crow,* 155 Ala. 534; 46 So. 646; *Herrington v. State,* 103 Ga. 318; 29 S. E. 931; In re Norton, 64 Kan. 842; 68 Pac. 639; *People v. Hylan,* 212 N. Y. 236; 106 N. E. 89.)

There is, however, against this doctrine, decided authority which holds that it is possible to have a de facto officer in the absence of any de jure office. This line of cases holds that where an office is provided for by an unconstitutional statute, the incumbent for the sake of public policy and the protection of private rights, will be recognized as an officer de facto until the constitutionality of the act has been judicially determined.

It has been pointed out, under this theory, that public policy requires obedience from the citizen to the provisions of a public statute which creates a municipality, and provides for its government, even though unconstitutional, so long as it has not received judicial condemnation, and that the same public policy should justify his obedience to every other law which the legislature has seen fit to enact until such law has been judicially declared invalid. And it is obvious that if individuals dealing with public officers might in every instance question their authority, or deny their right to exercise the office until courts of last resort had given the sanction of their approval to the validity of

the legislation under which the office was established, the conduct of public affairs would be involved in interminable confusion and doubt (R. C. L. vol. 22, pp. 591-592.) (*Long v. Bayonne,* 68 Atl. 90; *State v. Poulin,* 74 Atl. 119; *Jewel v. Gilbert,* 64 N. H. 13; 5 Atl. 80; *State v. Gardner,* 42 N. E. 999; Note, 140 A. S. R. 186.)

Thus, the Michigan Supreme Court, in *Donough v. Dewey,* 82 Mich. 309; 46 N. W. 782, while conceding the general rule that there cannot be an officer de facto unless there is an office de jure, yet declared that the rule was modified so far as concerns offices which have been created by the legislature while the statute creating them has not been declared unconstitutional. But this contention is opposed by those cases in which the doctrine is applied.

In *Burt v. Winona* (18 N. W. 285), the Minnesota court, while recognizing the conflict on the point, held, that where a court or office has been established by an act of the legislature, apparently valid, and the court has gone into operation, or the office is filled and exercised under such act, it is to be regarded as a de facto court or office; that the people should not be made to suffer because misled by the apparent legality of such public institutions.

The Supreme Court of Ohio in the case of *State v. Gardner,* (42 N. E. 999) held that the defendant in a prosecution for offering a bribe to one who acted as city commissioner could not challenge the constitutionality of the statute under which the latter was appointed, and by virtue of which he assumed to exercise the duties of his office. The court reluctantly denied the maxim that there can be no de facto officer unless there is a de jure office—and concludes with the statement that the circumstances under which the officers acted sufficient to give such color to their titles as to make them de facto officers. But that, whether they came within the previously existing definition of such officers or not, their official acts thus performed fall within the principle of public policy which defends them against collateral attack. The act in question created the municipal government of the City of Akron, under which the city government had been conducted for a number of years. The existing government of the City of Youngston also rested upon the same act. It is evident that this holding was influenced greatly by the extreme inconvenience of applying the general doctrine; the consequences of a holding that the acts of persons under the unconstitutional statute would not have constituted them de facto officers would have included many offices besides the one in question, and would have resulted in endless confusion.

Upon the authority of the last case, the Ohio court held in *State ex rel Strimple v. Bingham,* (14 Ohio 245) that even if the de jure title of a sinking fund commission was open to attack on the ground of the unconstitutionality of the statute creating the office yet their acts could be upheld as those of de facto officers.

In *Long v. Bayonne,* (1907, 74 N. J. 455; 68 Atl. 90) the Supreme Court of New Jersey held that police commissioners appointed under an unconstitutional law creating the office are, until the statute is condemned by the courts, de facto officers whose acts are binding on persons affected thereby. Chief Justice Gunmere in delivering the opinion said:

"Notwithstanding the great weight which the opinion of so distinguished a jurist (Mr. Justice Fields) carries with it, notwithstanding that *Norton*

v. Shelby County (*supra*) has been frequently cited with approval in other jurisdictions, I am unable to accept as sound the doctrine upon which it rests, namely, that an unconstitutional law is void ab initio, and affords no protection for acts done under its sanction. That it works injustice in its application is apparent. The Flancher case (a prior N. J. decision upholding the doctrine, which the court in this case overrules) is a pregnant example of the truth of this assertion. The legislature had created a general law making the unlicensed sale of liquor a criminal offense, but legalizing such a sale when made by a person holding a license from the proper authority. It then, by subsequent statute created the county board of license commissioners the proper authority to grant such liquor licenses in the county. Flancher applied to and received from this board a license to sell liquor. At that time the law creating the county board stood upon the statute books, apparently as valid, as much entitled to be respected and obeyed, as the enactment which prohibited the sale of liquor without license. And yet, notwithstanding that Flancher scrupulously obeyed the law, as declared by the legislature, he was made a criminal by judicial decision, a decision which in its effect and operation was as much ex post facto as any statute which makes a criminal an antecedent act which violated no law at the time when it was done.

"The vice of the doctrine of *Norton v. Shelby County*, (*supra*) as it seems to me, is that it fails to recognize the rights of the citizen, which are to accept the law as it is written and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law. . . . . To require the citizen to determine for himself, at his peril, to what extent, if at all, the legislature has overstepped the boundaries defined by the constitution would be to place upon him an intolerable burden—a duty definitely beyond his duty to perform. In my opinion, the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him, so long as it remains unreversed." (68 Atl. 90.)

There are some cases which recognize the validity of the general doctrine that the existence of a de jure office is a condition or a de facto officer, but hold that the condition is satisfied if there is a de jure office of the general character of that which the incumbent assumed to fill, although there was none at the particular time or place. (Ex parte State, 142 Ala. 87; 110 A. S. R. 207.)

The digests do not disclose any case wherein this point has been presented to our court; so the Mississippi ruling on this matter is yet to be laid down.

LEONARD E. NELSON.

VOL. II 1929

THE OFFICE OF PUBLIC DEFENDER.—The first office of Public Defender was established in the United States in the county of Los Angeles, California, in January, 1914. Mr. Mayer C. Goldman, of New York, has written a book which presents the history of the movement for adequate defense for the poor. He states that many other countries had long preceded the United States in selecting advocates to defend the poor accused of crime. When Ferdinand and Isabella ruled in Spain, an attorney who bore the stately title, "advocate for the poor," was provided at the public expense.

Persons accused of crime in all civilized countries have the inherent right to be heard and defend themselves against criminal charges. Judge Wood, of the Superior Court of Los Angeles County, has ably stated, "The right of defense and the means of defense are, however, very different matters and even to this day impoverished persons are without adequate means of defense

in most localities.''[1] The experiment instituted in California attracted nation-wide attention at the time, and laymen and lawyers discussed the wisdom of the state providing a lawyer for the defense as it does the lawyer for the prosecution.

The reform of the office of the public defender grew out of the conviction that if both the prosecution and the defense were paid for by the state both would be equally desirous of serving justice; that the poor, unable to hire good lawyers, defended by young or incompetent lawyers appointed by the state as the system then stood would instead be represented by state counsel. It was believed that a man accused of crime had an absolute right to a fair defense not as a matter of charity but justice. His right to a defense should not depend upon the bounty of any man but the public itself having brought the defendant to trial should see that he secures just trial. The criminal court performs the most important functions of any court since it deals with the life and liberty of the individual and even with the best of counsel there is danger of convicting the innocent. A defendant if innocent is able ordinarily to prove the fact only at a great deal of expense. It was felt that the poor under such a system were the helpless victims of shyster lawyers, or else dependent upon charity—a humiliation and blow to self-respect which a just society could not impose upon a presumably innocent person proven guilty only of poverty. It was believed that it would lead to the settlement of many more cases out of court since each attorney under the plan would desire to arrive at a just verdict; that it would save expense, both to the state and the accused; and that it would prevent the perversion of justice in the case of many habitual criminals.

It is interesting to determine whether in actual practice the public defender fulfills these hopes. The following table compares the cases defended by private and public defenders in Los Angeles County, California.

Comparison of Results of Cases defended by Private and Public Defenders[2]

	Assigned attorneys in 1913 serving without pay	Attorneys in private practice paid by defendants in 1914	Public Defenders in 1914
Number of cases	115	514	260
Pleas of guilty	71	250	183
Percentage of cases in which pleas of guilty were entered	67.7%	48.6%	70%
Number of cases in which probation was granted	31	154	87
Percentage of cases in which probation was granted	27.8%	30%	33.4%
Number of trials	30	147	58
Percentage of cases that went to trial	26%	28.6%	22.3%
Verdicts of not guilty or disagreements	6	54	20
Percentage of trials in which verdict of not guilty rendered or jury disagreed	20%	36.7%	34.4%

1 Annals of American Academy of Political and Social Science, vol. 124, pg. 69.

2 Gillin, Criminology and Penology, pg. 762.

This table indicates that a larger percentage of the accused represented by the public defender plead guilty than those represented by assigned lawyers or attorneys in private practice. A larger percentage of defendants represented of the public defender were acquitted, and a larger number placed on probation.

Objections are often made to the public defender upon the ground that it is an unauthorized infringement of the defendant's rights. The argument is presented that under the public defender system there would be fewer capable defense lawyers than under the present one.

Since the origin of the movement for a public defender in the United States, there seems to be a growing unanimity of opinion that where the system had been given a trial its results have been sufficiently worth while that it merits the serious consideration and study of every able lawyer. The legal profession should be deeply interested in every reform of penology. The office of public defender should have an unusual interest for the legal profession in Mississippi. The charge is often hurled at the legal system of the State that a member of the Negro race in the majority of cases does not secure justice in our courts. This we indignantly deny stating that if it be true that the Negro does not in many cases secure justice (and we deny that he does not receive it) still it is not because of racial discrimination, but that he faces the same situation as the poor white man. Living in a state having a large percentage of its population poor and often ignorant, the legal profession cannot lightly cast aside as not meriting thought any serious proposal to serve more adequately equal justice for all. The late Chief Justice Taft in his preface to the pamphlet entitled "Growth of Legal Aid Work in the United States," issued of the United States Department of Labor, stated, "I think that we shall have to come and ought to come to the creation in every criminal court of the office of Public Defender, and that he should be paid out of the treasury of the Court or State."[3]

LYDA GORDON SHIVERS.

LOCAL PREJUDICE AS GROUND FOR CHANGE OF VENUE OF CRIMINAL PROSECUTIONS.—I—RELEVANT STATUTES: The law in Mississippi as to the venue of criminal matters is:

"The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where the offense was committed. But, if on the trial the evidence make it doubtful in which of several counties, including that in which the indictment alleges it, the offense was committed, such doubt shall not avail to procure the acquittal of the defendant."[1]

"On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case as may be proper."[2] [3]

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[3] New Republic Vol. 48, pg. 72.
[1] Code of 1906, Sec. 1401.
[2] Code of 1906, Sec. 1484.
[3] Code of 1906, Secs. 1485, 1486, 1487, 1488, 1489.

II—Prejudice as a Ground for the Change of Venue—What is Sufficient, and What is Not:

It is noticed by the statute above that prejudice properly alleged and proved will constitute proper ground for the removal of a case from one county to another.

In Dillard v. State,[4] Dillard was accused of having committed murder and was indicted by the grand jury. Thereafter he applied for a change of venue on the ground that because of undue prejudice in the minds of the public of the county it would be impossible for him to have a fair and impartial trial, to which he was entitled. The defendant made affidavit to that effect as also did six other persons. After the affidavits were made, twenty-four by-standers in the court room from different parts of the county testified that they were not aware of such prejudice as would deprive the accused of a fair and impartial trial, and frankly stated it to be their opinion that he could get such a trial. The lower court then refused the change of venue, and it is assigned as error on appeal. In the Supreme Court, Chief Justice Chalmers, in delivering the opinion of the Court in the case, said:

"There was no error in refusing the change of venue. Six affiants made oath for defendant that such prejudice existed in the county that an impartial trial could not be there had. Twenty-four persons, by-standers in the court room, from different portions of the county, testified that they knew of no such prejudice, and that in their opinion an impartial trial could be had in the county. This justified the action of the court."

In another case, Justice Whitfield delivered the opinion of the Court and had the following to say:

"Reluctant as we always are to interfere with the exercise of discretion in the lower court, we have been compelled in this case, after the most careful consideration, to hold that the application for a change of venue should have been granted. Twenty-five witnesses, besides the defendant, testified positively that, by reason of 'prejudgment of this case, or grudge or ill will towards the defendant,' he could not obtain a fair and impartial trial in the county. Some twenty witnesses were examined by the State; a number of them had formed opinions as to the guilt of the defendant which it would require evidence to remove. Most of the expressions heard by these witnesses were decidedly adverse to the defendant. Defendant was a stranger in the county. Deceased's family connections were numerous, prominent, and influential, and scattered over the county, especially the eastern part of the county, where was the largest white element. One of the jurors was by affinity related to the deceased in the fourth or fifth degree and yet seems not to have known it. So intense was the feeling aroused against the defendant that mob violence threatened the jail, which had to be guarded. We will not enlarge further. Under this showing the venue should have been changed."[5]

Another case upon the subject involved a person indicted for the murder of another. In the procedure an application for a change of venue was made, whereupon a hearing was had upon the question whether or not a fair and impartial trial could be had. On the hearing, a number of witnesses testified that they had heard expressions in the county to the effect that defendant ought to be hung, that when he was denied bail, there was applause in the court house, one witness testifying that it would be almost impossible to secure a fair trial, and another, that every person he had talked to on the subject

4 58 M. 370.
5 *Saffold v. State*—76 M. 258.

thought an impartial trial could not be had. Several others testified that they believed that a competent jury could be gotten from the county, who would try the case lawfully, and still another testified that he believed a hundred men of that calibre could be gotten from the county. The application was denied, and the defendant was sentenced to serve a term in the prison. He appealed. The case was reversed and sent back, because the lower court erred in refusing the change. The Court said:

"There would be little scope for the operation of the venue statute if defendants could always be compelled to be tried where they are best known, and where the circumstances of the killing are thoroughly familiar to all. The object of the statute is to avoid the grudge and ill will and prejudgment that often arise from this very familiarity with all the facts. It is a great mistake to suppose that because an atrocious crime has been committed, for which one ought certainly to be convicted anywhere, therefore a change of venue should not be granted. It is one of the crowning glories of our law that, no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom, when brought to trial anywhere, he shall, nevertheless, have the same fair and impartial trial accorded the most innocent of defendants. These safeguards, crystallized into the constitution and laws of the land as the result of centuries of experience, must be, by the courts, sacredly upheld, as well in case of the guiltiest as of the most innocent defendant answering at the bar of his country. And it ought to be a reflection always potent in the public mind, that, where the crime is atrocious, condemnation is sure, when all these safeguards are accorded the defendant, and therefore the more atrocious the crime, the less need is there for infringement of these safeguards."[6]

By these cases and a number of others[7] we are ready for the announcement of the general proposition, that wherever, upon the hearing of the application for the change of venue, the State can show by competent and persuasive witnesses that the affidavits of the defendant and the others as required by statute are not well founded, it is the duty of the court to refuse to grant the removal or the change. In every case where the testimony and showing of the defendant is straightforward and is worth believing at its face value, then the duty of the court to grant the application is undoubted; but often, as seen in the above case, those used for the amplification of the application and those used by the State are of a different idea as to the necessity or the importance of the change, and then the matter is left up to the sound discretion of the judge trying the case or rather the court, and the Supreme Court is hesitant about interfering with the finding of the lower court in such matters where there has been a use of its discretion in so finding.[8]

KERMIT R. COFER.

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6 *Tennison v. State*—79 M. 709.

7 *Anderson v. State*—92 M. 656; *Purvis v. State*—71 M. 706; *Butler v. State*—39 So. 1005; *Peoples v. State*—33 So. 289; *Brown v. State*—83 M. 645.

8 *Saffold v. State*—76 M. 258; *Weeks v. State*—31 M. 501; *Bishop v. State*—62 M. 294; *Cavanah v. State*—56 M. 300; *Stewart v. State*—50 M. 587.

RECENT IMPORTANT DECISIONS

AUTOMOBILES—THE REASONABLENESS OF THE "FAMILY PURPOSE DOCTRINE."—Plaintiff was struck and injured by an automobile owned by the defendant and driven by his wife, and sued defendant for damages. The evidence disclosed that the automobile was owned by the appellee and was used for general family purposes, being driven sometimes by the defendant and sometimes by his wife.

The court held in this case that defendant was not liable for the injuries negligently inflicted by wife in driving the automobile, where he was not negligent in permitting the wife to drive the automobile. *Smith v. Dauber*, 125 So. 102.

The Mississippi Supreme Court in this case rejected the "Family Purpose Doctrine" as being "a modern innovation in the law," feeling that it was not justified in departing from the old rule of non-liability except in case the relation of master and servant existed.

The holding in this case raises the question of a future policy with regard to this question of owner's liability. The increased use of the automobile in this age, together with the growing practice of the head of the family providing individual cars for each member, will give rise to this proposition more and more often as the practice increases.

The substance of the doctrine is that when the father or other head of a family supplies an automobile for the use and pleasure of the family, permitting the members thereof to use it at will, those members, thus using the automobile, become the agents of the head of the family, and that each one using it, even for his sole personal pleasure, is carrying out the purpose for which the automobile is furnished, and is the agent or servant of the head of the family, so that the latter is liable for injuries resulting from negligence, under the doctrine of respondeat superior.

There is considerable division of authority on the application of this "Family Purpose Doctrine." The courts of last resort in Minnesota, Iowa, Georgia, Oklahoma, New Mexico, North Dakota, Wisconsin, Washington, Colorado, Montana, South Carolina, and Tennessee have announced in more or less broad terms the application of the doctrine. *Dircks v. Tonne*, 183 Iowa, 403; *Plasch v. Fass*, 44 Minn. 44; *Griffin v. Russell*, 144 Ga. 275; *Boes v. Howell*, 24 N. M. 142; *McNeal v. McKain*, 33 Okla. 499; *Ullman v. Lindeman*, (N. D.) 176 N. W. 25; *Birch v. Abercrombie*, 74 Wash. 486; *Hutchin v. Haffner*, 63 Colo., 365; *Lewis v. Steele*, 52 Mont. 300; *Davis v. Littlefield*, 97 S. C. 171; *King v. Smythe*, 140 Tenn. 217.

On the other hand, the courts of last resort in New York, Missouri, North Carolina, Maine, Alabama, Utah, New Jersey, Mass., New Hampshire, Virginia, Kansas, California, Ohio, Illinois, Michigan and Mississippi have refused to apply this doctrine. *Hays v. Hogan*, 273 Mo. 1; *Van Blaricom v. Dodgson*, 220 N. Y. 111; *Linville v. Nissen*, 162 N. C. 95; *Parker v. Wilson*, 179 Ala.

361; *Doran v. Thomsen*, 76 N. J. 756; *Smith v. Jordan*, 211 Mass. 269; *McFarlan v. Winters*, 47 Utah 598; *Blair v. Broadwater*, 121 Va. 301; *Watkins v. Clark*, 10 Kan. 629; *Loehr v. Abell*, 174 Mich. 590; *Woods v. Clements*, 113 Miss. 720.

J. Lansden, of the Supreme Court of Tennessee, in the opinion rendered by him in the case of *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296, uses some strong reasoning in upholding the doctrine, when he said, "If a father purchases an automobile for the pleasure and entertainment of his family, and gives (a member of his family) permission to use it for pleasure, except when needed by other members, it would seem perfectly clear that the member of the family is in furtherance of this purpose of the father while driving the car for his own pleasure. It is immaterial whether this purpose of the father be called his business or not. The law of agency is not confined to business transactions. It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal turned loose in the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support or property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to persons and property occasioned by their negligent operation by infants or others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities."

N. H. MALONE.

Indictments—Effect on Indictment, for Extortion, of Reading Before Grand Jury Bar Association Committee Report Charging Same.—Appellee, a Justice of the Peace of Forrest County, was indicted for the crime of extortion in office. A few days before the indictments were returned against appellee, the Forrest County Bar Association, composed of thirty lawyers, held a meeting at which a committee was appointed to investigate the conduct of the offices of the Justices of the Peace in Forrest County. The committee made a very lengthy written report in which it was stated that appellee, for one, was guilty of certain acts of extortion while in office, these acts being set out in the report. It appears that while the grand jury was

considering whether they would return the indictments against the appellee there were three copies of this report in the room with the grand jury, and one copy was read to the grand jury by the secretary of the committee. On motion the indictments were quashed by the court on the ground of improper outside influences. State appeals. Our Court held, through Anderson, J., that the presence of this report in the grand jury room, and its consideration by the grand jury, was a matter of such a character as to vitiate the indictments. *State v. Owen*, (Miss.) 126 So. 25.

An organization of the legal profession in any community ought to be, and often is, a very powerful influence in such community. The law prohibits outsiders from taking any part whatever in the deliberations of the grand jury. The members of the grand jury should be permitted to act entirely free from any outside influence or control. The grand jury is a coordinate branch of our criminal jurisprudence. If the grand jury were permitted to be influenced by outside means, although with the best of motives, the way would be paved for outside influences with bad motives. The findings of the grand jury must be unaffected by fear, sympathy, or public sentiment.

As stated by Justice Anderson, the committee no doubt had the very highest motives behind their acts; but their motives must be disregarded. Although the action of the Forrest County Bar Association is highly commendable as far as is concerned the investigation of the corruption in office let us hope that the other counties, who probably would benefit by such an investigation, will see fit to keep their reports from the hands of the grand jurors and thus aid the courts in their administration of justice.

HENRY HILBUN, JR.

Federal Employer's Liability Act—What Acts of Railroad Employees Are and Are Not a Part of Interstate Commerce?—Plaintiff was employed as a brakeman and worked as a switchman in yard crew of defendant railroad company. On the morning of the day of his injury he was so employed in switching interstate and intrastate cars. After lunch he was directed by the yard foreman to test out the fire hose of the engine which he had been using in the car switching. The engine was removed to a quiet track and while plaintiff was testing hose it burst and he was severely injured by hot water and steam. He brings this suit attempting to hold defendant liable under the Federal Employer's Liability Act, claiming he was engaged in interstate commerce at time accident occurred. HELD—Act of employee in testing hose of engine used in interstate commerce was not an act so closely connected with interstate commerce as to be a part thereof, and injury received during said act cannot be recovered for under the Federal Employer's Liability Act. *Onley v. Lehigh Valley R. R. Co.*, 36 Fed. (2ds) 705.

The case in discussion presents an interesting statement of facts on the question as to what acts are so closely related to interstate commerce as to become a part thereof. The test as to what acts are a part of interstate commerce requires that the act be so closely related to such commerce as to be a part thereof. Numerous decisions have held that repairs of locomotives, cars, bridges, tracks, etc., used in interstate commerce, are such acts as are closely

enough related, and further, that even the slightest connection with interstate commerce is enough to give a whole train that character, even a single package of interstate commerce goods, however small, in a car is sufficient. Here, the engine tested was regularly used in switching interstate cars, and was so used up to the time it was run on the quiet track for its testing. Thus, the engine in question with which the brakeman worked was engaged in interstate commerce, for as soon as the test was to be over it was to have been used in its regular switching work which was interstate in character. The brakeman working with the engine was also so engaged. The testing of the engine and its parts is a necessary incident to its operation, and, as such, is a part of interstate commerce. The brakeman was injured while engaged in such testing and, in my opinion, it seems that he was clearly engaged in interstate commerce at the time the injury occurred to him. However, the court has seen fit to hold differently, holding that such testing was not a necessary incident to the operation of the train, but this decision certainly seems to have been closely drawn to reach such a conclusion. Were it not necessary to interstate commerce to test out locomotives and their equipment, such would not be done; but such is essentially necessary to the safety and best operation of a train, for it is clearly seen that by this manner alone can they be kept in the best of condition, so necessary to transportation. How such tests are not an essential part of the operation of engines in interstate commerce is indeed hard to see and understand. Courts of this same State have held that the painting of a baggage room where interstate and intrastate baggage was kept was a part of interstate commerce. *McLean v. Boston and M. R. R. Co.*, 116 A. 435. Further, a Federal decision of the same State has held that the spiking of a switch for a train of 14 cars, one being interstately engaged, was such an act as was so closely related to the interstate work as to be a part thereof. As has been before noted, it is extremely difficult to draw the line as to what acts are and are not a part of interstate commerce; but the act in question in the present case certainly seems to come clearly within the classification of interstate commerce, and the holding of the court in this instance is indeed hard to clearly agree with.

T. H. CAMPBELL, JR.

AUTOMOBILE GUEST NOT OBJECTING TO EXCESSIVE SPEED HELD GUILTY OF NEGLIGENCE BARRING RECOVERY FOR INJURIES SUSTAINED WHEN AUTOMOBILE WRECKED.—The defendant's wife being sick, he sent W. R. Gibbs, a volunteer, to a neighboring town to bring his daughter home. The plaintiff went with Gibbs as a companion and guide to get the daughter, Gibbs driving the defendant's automobile. During the trip Gibbs drove the car at an excessive rate of speed, to which the plaintiff made no objections. On the return trip the car, on account of excessive speed, was driven in a ditch, and the plaintiff was injured. He brought suit against the defendant for damages. HELD: the failure of the plaintiff to object to the excessive speed constituted negligence, which barred a recovery by plaintiff. *Hutchens v. Morgan*, Court of Appeal of La. (Dec. 31, 1929), 125 Sou. 309.

The basis of the decision of the court is that the guest acquiesced in the unlawful speed, and thereby cannot complain. The court intimated that

where it would be futile for the plaintiff to object, he may be allowed to recover even though he voices no objections. The court in the opinion said:

"The plaintiff was merely a guest, and he knew Gibbs was operating the car at an excessive rate of speed, and, it having been conceded that the accident was due to the excessive rate of speed at which the car was operated, and it being shown that plaintiff did not make any protest, we are of the opinion that he was guilty of negligence, even conceding that he was a mere guest."

The cases unanimously support the principle announced in the principal case. *Sharp v. Sprout,* 208 Pac. 613; *Naglo v. Jones,* 222 Pac. 116; *Hubbard v. Bartholomew,* 144 N. W. 13; *State v. Phillenger,* 120 Atl. 878; *Joyce v. Brockett,* 200 N. Y. Supp. 394; *Harding v. Jesse,* 189 Wis. 659; *Spring v. McCabe,* 200 Pac. 41

JASON H. FLOYD.

Master and Servant—Negligence—No Right of Recovery in Servant Employed to Keep Premises Clean Where Injured Because of Failure to Perform Duty.—One S. C. Dickinson sued the Edward Hines Lumber Company for personal injuries sustained by him in working in a mill belonging to and operated by defendant. He was hired by one Mr. Tatum, a person employed by the Company to keep the saw filing department in condition, as his assistant. It was the duty of plaintiff to clean the floor of the saw filing department and his failure to do so resulted in such floor becoming greasy, slippery, and accumulated with trash, which resulted in his falling to the floor by slipping and being injured by suffering a hernia. Under these facts the court denied Dickinson's alleged right of recovery. *Edward Hines Lumber Co. v. Dickinson,* (Miss.) 125 Sou. 93.

A person cannot profit by his own wrong, and, where he is employed to make a place safe or keep a place safe as part of his employment, and negligently fails to do so, he cannot attribute his own negligence to the master and thus profit by his own wrong.

The rules of law called attention to in this case are not new in this State—having in fact been propounded by our Supreme Court in several cases, namely, *Hoops v. Mills,* 101 M. 91; *Heywood v. Newman Lumber Co.,* 132 M. 487; and *Waterman Fouke Lumber Co. v. Miles,* 135 M. 146, all holding that the master is not liable for negligence when such negligence is traced through the party injured, and whose injuries are the result of his own negligence. This principle of law applies, of course, to those duties that are delegable by the master. Such a rule would not apply in case of injury due to failure of the master to perform a non-delegable duty, where such failure results in the injury complained of. It seems that in such a case the contributory negligence of the servant would properly be a matter of mitigation of damages, or a matter defeating recovery as the case may be. Further this case seems to come within the exception to the master's liability in providing his servant with a safe place to work known as the "operative details" of the business. Clearly the duty of Dickinson in being required to clean up the grease and trash which accumulated on the floor of the saw filing department was an operative detail in the business of the manufacturing of lumber, liability for which could not be imputed to the defendant. *Miller v. Centralia Pulp Co.,* 13

L. R. A. (N. S.) 742. See also *Wickham v. Detroit United Ry. Co.*, 52 L. R. A. (N. S.) 1082, and *Shank v. Edison Electric Illuminating Co.*, 30 L. R. A. (N. S.) 56. This case seems not of the class of non-delegable or absolute duty, but on the other hand embraces that duty which is a detail in keeping the working place safe after it had been turned over to the servant in a safe condition.

E. J. SIMMONS, JR.

FRAUD—SETTING BACK SPEEDOMETERS—WHETHER ONE FAMILIAR WITH USED CARS MAY RELY ON REPRESENTATION OF USED CAR DEALER AS TO MILEAGE.—The appellee bought from the appellant a second hand Nash coupe, for which he agreed to pay the appellant the sum of $1000, of which $400 was paid at the time of the purchase by appellee trading in, as part payment for the Nash coupe, a Dodge roadster. The balance of $600 was to be paid in twelve monthly installments. One of these installments was paid. After using the Nash coupe for a while, the appellee returned it to the appellant, leaving it at the latter's place of business. In so doing, it was the appellee's purpose to rescind the contract for certain reasons which he did not rely on in the trial of the case. The ground relied upon at the trial for rescission, however, was that the appellant perpetrated a fraud upon him in falsely representing that the Nash coupe had been run, approximately, only 8000 miles, when, as a matter of fact, it had been driven many thousand miles more. The speedometer on the car showed that it had been driven slightly over 8000 miles. Parquette, a witness for the appellee, testified that it was not unusual for the appellant to set speedometers back on second hand cars; and that on occasions, he had been employed to do so. Evidence that the speedometer on the Nash coupe stood at approximately 8000 miles when the appellee purchased same seems to have been undisputed. The appellee, in testifying, admitted that he was familiar with second hand cars, having dealt in them. HELD, on appeal, that the seller's representations regarding the mileage of an automobile constituted representations of a material fact; and that the appellee could rely on same, regardless of his ability to ascertain the true facts, or how familiar he might be with second hand automobiles; and that a misrepresentation of the mileage on the car was a ground for rescinding the contract. *Nash Mississippi Valley Motor Co. v. Childress*, 125 So. 708.

Our Court, in holding that the purchaser could rely on representations of the seller as to facts within the latter's knowledge, regardless of the purchaser's ability to ascertain the falsity of such representations, has not done so without ample authority, which undoubtedly constitutes the majority rule. *Gannon v. Hausaman*, 40 Okla. 41, 140 Pa. 407; *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143; *Fosburg v. Couture*, 126 Wash. 181, 217 P. 1001, 1002; *Gallon v. Burns*, 101 A. 504, 92 Conn. 39. Notwithstanding the authority cited, there is respectable authority to the contrary, holding that when the purchaser might have ascertained the true facts by inquiry he will not be entitled to recover unless he did make such investigation as necessary, especially when both the seller and purchaser were familiar with the thing being sold, as they seem to have been in this case. *Palladine v. Imperial Valley Farm Lands Assn.*, 225 P. 291, 65 Cal. App. 727; *Jasper v. Bickness*,

162 P. 144, 62 Colo. 318; *Dickerson v. Dickerson*, 137 N. E. 468, 305 Ill. 521. In citing the authority holding contrary to the holding of our Court in this case, it is in no wise an attempt to show that the Court has gone afield in its decision, for clearly it has not. But this authority is to show that our Court could have, on sound legal principle, refused to protect the purchaser in this case. But on the other hand, our Court has gone the full way to protect the purchaser from the unscrupulous second hand car dealer, who, almost without exception, changes the mileage on speedometers and misrepresents the mileage that the cars have been actually driven. This should be gratifying to the purchaser; and, it should serve as notice to the second hand automobile dealers that their business will necessarily have to be conducted along the same ethical lines as other businesses.

CARY STOVALL.

Act Which Tends to Obstruct Untrammelled Exercise of Judicial Power is Punishable Contempt, Irrespective of Place of Its Commission. 28 U. S. C. A. Sec. 385.—In January, 1927, at the term of the U. S. District Court held at Winona, Minnesota, Judge J. B. Sanborn presiding, Frank Sommers was indicted. J. S. Pratt, Special Assistant Attorney General, was in charge of the case. After the indictment was returned but before the trial, Froelich, in St. Paul, Minnesota, wrote a letter to Pratt in Toledo, Ohio, which was mailed and received by Pratt, in which Froelich stated that Judge Sanborn was prejudiced in favor of Sommers, and had sought to get the jurors not to find an indictment against him; that justice could not be done with him on the bench. Froelich was tried and convicted of contempt, being sentenced to six months in jail, from which he appealed. He contended the alleged contempt was not "within the presence of the court, or so near thereto as to obstruct the administration of justice," as provided by 28 U. S. C. A., sec. 385. HELD, the effect of the letter written by the defendant was to obstruct and prevent untrammelled or unprejudiced exercise of judicial power, and was punishable contempt. *Froelich v. United States*, Circuit Court of Appeals, July 6th, 1929, 39 Fed. 660.

When Congress first gave the Federal judges power to punish for contempt there was no limitation that same should be in the presence of the court, or so near thereto as to obstruct the administration of justice. Following several convictions for contempt on account of criticisms of judges and their decisions, the criticisms taking place in several instances after the case in question had been closed, Congress added the limitation on the power of the judges to punish for contempt that the act complained of must have been committed in the presence of the court, or so near thereto as to obstruct the administration of justice. This limitation has been construed by the courts to mean that the act complained of need not be committed in proximity to the court, but that the effect of the act must be such as to obstruct the administration of justice. No matter where the act may be committed, if it tends to assail the authority and independence of the courts, it has been committed "so near the presence of the court as to obstruct the administration of justice" within the meaning of the statute, and is a punishable contempt. In this case the court said: "Whether an act is within Section 268 of the Judicial Code, depends not on the place where it was committed, but on its

character. If it tends to obstruct and prevent the untrammelled and unprejudiced exercise of its judicial power, it is a punishable contempt.'' The Federal courts have uniformly announced this principle. *U. S. v. Toledo Newspaper Co.*, 220 F. 458; *U. S. v. Anonymous*, 21 F. 761; *Ex Parte McLeod*, 120 F. 130; *In re Independence Publishing Co.*, 228 Fed. 787; *Kirk v. U. S.*, 192 Fed. 273; *U. S. v. Huff*, 206 Fed. 700.

JASON H. FLOYD.

AUTOMOBILES—WHETHER VENDOR'S LIEN IS PRIOR TO THAT OF MECHANIC. —Appellee had sold the car in question to one Crittenden, who executed a conditional sale contract. The car was later wrecked while in possession of the purchaser, he owing a balance of the purchase money. He then procured appellant to make repairs on the car amounting to the sum of $157.30, to which interest was added. The appellant held the car by virtue of a mechanic's lien, claiming same to be superior to that of the vendor's, who also has a lien on same for the unpaid balance of the purchase price. This suit was brought to determine whose lien took priority. HELD, lien for repair of automobile purchased on conditional sale contract, was, without seller's consent to repairs, inferior to claim of seller. *Wyatt v. Drennen Motor Co., et al.*, (Ala.) 125 So. 649.

This case calls to our attention a much mooted legal question regarding the priority of the mechanic's lien and the conditional vendor's lien. Mississippi seems to have adopted a different rule from the Alabama court, holding: Under code 1906, section 3075, a mechanic who repairs an automobile has a lien which takes precedence over the rights of the vendor who transferred possession, but reserved title to secure payment. *J. A. Broom & Son v. S. S. Dale & Sons*, 67 So. 659, 109 Miss. 52, L. R. A. 1915D, 1146. The Mississippi Court has also laid down a rule which, too, is apparently in conflict with the Alabama holding in the case above, the Mississippi Court making the following ruling: The seller of an automobile with title retained has superior rights over a mechanic's lien for repairs of the car at the instance of the purchaser in possession, unless such repairs are reasonably necessary to preserve the property, permit its operation, and prevent deterioration, for, under such necessitous circumstances authority of the owner to repair will be implied. *Moorhead Motor Co. v. H. D. Walker Auto Co.*, 97 So. 486, 133 Miss. 63.

The following authority is in accord with the Mississippi holding: *Atlas Securities Co. v. Grave*, 137 N. E. 570, 79 Ind. App. 144; *Etchen v. Dennis & Son Garage*, 178 P. 408, 104 Kan. 241; *Winton Co. v. Meister*, 105 A. 301, 133 Md. 318. While on the other hand, we find authority holding the same as Alabama has held: *Shaw v. Weeb*, 174 S. W. 273, 131 Tenn. 173, Ann. Cas. 1916A. 626; *Cuneo v. Smith*, 146 N. E. 674, 251 Mass. 399. Thus we see that both rulings are supported by equal authority. However, it seems that the rule followed by the Mississippi Court is much more equitable than the line of authority followed by the Alabama Court. The rule which Mississippi follows goes on the theory that when repairs are necessary to the preservation and operation of the car, that there is implied authority from the vendor to repair the automobile, and that inasmuch as the repairs are necessary to

the car an advantage inures to the vendor, and that therefore the mechanic's lien should take priority over the vendor's.

CARY STOVALL.

INDICTMENTS—VALIDITY OF INDICTMENT FOUND AND RETURNED AT A TIME WHEN THE STATUTE PROVIDES FOR A CIVIL TERM OF COURT.—In the Circuit Court of Lafayette County, Lula Williams was indicted for and convicted of murder, and sentenced to serve a life term in the State Penitentiary. The indictment in this case was returned by a grand jury convened at a term of court where the circuit judge undertook to hold a special term for criminal business at a time when the statute provides for a civil term of court devoted exclusively to civil business, and at which no grand jury was to be impaneled. A motion to quash the indictment on this ground was overruled and the defendant appealed. Reversed, indictment quashed, and appellant held to await the action of the grand jury. *Williams v. State*, (Miss.) 126 So. 40.

In the case before us the court should have sustained the motion to quash the indictment. There was no authority to impanel a grand jury at this term of court and the impaneling and proceedings of the grand jury thereat are a nullity. We are of the opinion that where the law provides for a civil term of court for the transaction of civil business exclusively, a special term called for the same time and place by the judge will not supersede the statute, and the term of court will be that for which the Legislature provided; but we find from the language of this statute that the court was directed by the Legislature not to impanel a grand jury at this particular term of court, the Legislature having provided for two terms of court at which grand juries could be impaneled. The judge had no authority, statutory, constitutional, or otherwise, to set at naught the will of the Legislature.

It is interesting to note that at the next regular criminal term of court Lula Williams was again indicted for murder by the Lafayette County grand jury. As there were no eye witnesses to the murder, and as the defendant testified to a state of facts not contrary to the physical circumstances, showing that the killing was done in self defense, the court gave a directed verdict for the defendant.

HENRY HILBUN, JR.

SEARCHES AND SEIZURES—INTOXICATING LIQUOR—AN INTERPRETATION OF THE JONES ACT.—The petitioner, Anthony J. Setaro, had been under observation of the prohibition agents for some time. He was engaged in the grocery and confectionery business in Danbury, Conn. Toward the rear of the premises occupied by his store there was a private garage used by petitioner. On June 17, 1929, two Federal prohibition agents parked a car where they could watch petitioner, whom they saw drive his car into the garage, carry two cans from it into his store. The agents drove to the garage; seemingly there was no arrest of petitioner at this stage, they merely showing their badges and explaining their status. Upon questioning petitioner the agents went to the car and searched it, finding in it quantities of intoxicating beverages. The agents seized also liquor in petitioner's store,

found on statement of Setaro, and further carried Setaro to the police station. Evidence as to the exact time of the arrest was contradictory.

HELD: Evidence obtained under unlawful search must be suppressed upon proper application and property returned. Legality of an arrest renders it an incidental search without a warrant of premises in which arrest took place, lawful or unlawful, depending on lawfulness of arrest to which it is incidental—must be an incident to arrest and not to ascertain grounds for making arrest. To render an arrest for a misdemeanor lawful, offense must have been committed in the presence of the officer. To render an arrest a legal arrest for a felony with a warrant, it must appear that a felony has been committed, and that arresting officer has reasonable grounds for believing that the person arrested committed it.

Crime of transporting liquor is not necessarily converted from a misdemeanor to felony by statute, but slight or casual violations remain punishable as misdemeanors. Whether offense under National Prohibition Act is felony or misdemeanor cannot be determined in advance of trial. Arrest without warrant of grocer seen carrying cans from garage to store held illegal, for want of showing of offense committed in officer's presence or that transportation of liquor constituted felony. Search without warrant of grocer's garage and automobile for intoxicating liquors preliminary to arrest, after seeing grocer carry cans from garage to store held illegal. Illegal search is not rendered valid by defendant's confession. *United States v. Setaro,* 27 Fed. (2d. S.) 134.

The Federal Court of District 5, Connecticut, in the above case of *U. S. v. Setaro,* in its interpretation of the Jones Act (27 U. S. C. A. Sec. 91, 92) Cr. Code, Sec. 335 (18 U. S. C. A. Sec. 541), providing that certain offenses including that of transportation of intoxicating liquors may be punished by imprisonment not to exceed five years, holds that Congress intended that the courts should discriminate between casual or slight violation, and habitual sales of intoxicating liquor or attempts to commercialize violation of the law—that casual or slight violations of law by transportation of liquor was merely a misdemeanor.

Where person lawfully arrested is riding in an automobile which is under his control and which could be used in makng his escape should opportunity be presented, the officers may take charge of and search the automobile and may seize whiskey found therein. *Toliver v. State,* 133 Miss. 789.

Where automobilist replied to question of sheriff, before arrest or search, that kegs in his automobile contained whiskey sheriff was authorized to arrest without warrant and to seize intoxicating liquor without warrant. *Williamson v. State,* 140 Miss. 841.

Right of search incident to lawful arrest does not extend to search of entire premises of person arrested. 147 Miss. 31.

E. J. SIMMONS, JR.

BOOK REVIEWS

A Treatise on the Substantive Law of Equity Jurisprudence. By Fred F. Lawrence. In two volumes. Albany: Matthew Bender and Company, 1929. Pp. clxxiii, 623; xxii, 633-1407.

Mr. Lawrence has attempted in his study of Equity Jurisprudence to answer, so he states, the challenge which he feels that eminent scholars have in effect thrown out, when answering the question, "What is Equity?" by denying that it has any significance other than historical. He feels that its fortunes are destined to wax rather than wane; that courts, lawyers, and law schools should accord to it the position of dignity in the science of jurisprudence to which it is fairly entitled.

In the first chapter the traditional concepts of Equity are discussed in which the three classical theories of Equity are brought forward and analyzed, and all of which is offset against the real nature of Equity in the second chapter. The historical side of Equity is rather briefly taken up in chapter three, followed by an analysis of the scope of Equity. The well known maxims of Equity are listed; also "Equity Acts in Personam," and "Remedies at Law," are contrasted. There follows a rather limited and inadequate survey of the fields of performance of contracts, injunctions, fiduciary relationships, trusts, enforcement of invalid contracts, clouds on title, interpleader, liens and judgments.

The two volumes are equipped with a very good index which is a great asset to them. There is an abundant table of cases which includes not only all of the leading cases in Equity but also the most modern ones. There is little use of the contributions in the law journals on the subject. Practically half of this 1200 net page treatise is taken up with references and footnotes. The author's attitude is unbiased on the whole, and on those questions under dispute he is indeed tolerant and fair-minded in spite of his avowed purpose.

As a text book, due to the fact that it lacks conciseness and brevity, it will hardly be adequate though it has abundant illustrations for class room use. For the use of those engaged in practice, it may be more beneficial though it does at times treat the well-known and obvious too thoroughly. The work shows considerable labor and thoughtful analysis, but is indeed poorly arranged.

T. P. BRADY.

Famous Speeches by Eminent American Statesmen. By Frederick C. Hicks, St. Paul: West Publishing Co., 1929. Pp. xi, 962.

The compiler of this meritorious work has sought to portray the spoken word as used in the language of modern and near modern America.

Our mechanical and industrial age has, to a certain extent, come to look on oratory as a lost art. The eloquence of the forum has given away to the dogmatic conciseness of the newspaper, and with perhaps better results. No longer does a Patrick Henry, in tones of thunder, hurl defiance in the teeth of a foreign agressor; no longer does the suave eloquence of a Henry Clay heal the sores of our internal strife; nor do the passionate appeals of a Webster stir the hands of justice to action. Our speakers of today attempt to present their arguments by the sheer weight of logical reason, strengthened by incontestable facts. While the silver tongue and the impassioned appeal are still to be reckoned with as worthy opponents in a wordy battle, still they are placed somewhat in the background by the demand of a practical-minded people for fact-substantiated reason.

However, this does not sound the death knell of the ancient art of oratory. It merely proves the permanence of its existence by showing that it can change and adapt itself to a changing age.

In the days of the immortal Webster, five thousand people were a huge concourse to assemble for an oration or a debate and half of these could do nothing but catch the gyrations of the speaker on the stand and then gather the gist of his remarks from an imperfectly printed newspaper on the following day or thereafter. Today, the amplifier makes it possible for an audience of fifty thousand people to hear and see a speaker, while the radio carries his voice to listening millons. Never before has the spoken word been as great a factor in the political, industrial, and religious life of the nation as today.

In this selection of speeches, Dr. Hicks, the compiler, has attempted to give evidences of the attitude of American speakers and statesmen on almost every political and industrial question that has presented itself to America since the Secession. The unlimited field that he has thus invaded is difficult to encompass in one volume, even in a representative way, but the task is accomplished with very little, if any, omission of important questions, and with remarkable acumen as to choice of speakers.

The calm, sagacious reasoning of Abraham Lincoln, in his storied Gettysburg Address, stands out in bold relief. The bitterness of Seward against Slavery is forcibly shown in his speech in the Senate on the admission of California into the Union, only to be offset by the equally strong and biting words of Judah P. Benjamin on the Secession of South Carolina, and in his farewell address to the Senate on the secession of his own State, Louisiana.

Again, the heartbeats of our progress are recorded in Susan B. Anthony's violent denunciation of the sentence passed on her for illegal voting, which denunciation sounded the alarm that eventually led to Woman's Suffrage and the Nineteenth Amendment to the Constitution of the United States.

Henry W. Grady, in his speech on the Race Problem, is given a well-merited place among American orators. He discusses that question with a clarity of vision and an earnestness of appeal that only a true son of the Southland could have attained.

One of Mississippi's illustrious sons is added to that Roll of Honor when the golden eloquence of John Sharp Williams immortalizes the name of another great Mississippian, Jefferson Davis.

The brusque forcefulness of Theodore Roosevelt and the calm idealism of Woodrow Wilson are there, presenting a strange contrast.

This book is distinctly valuable in that it records, with almost minute exactness, the trend of the nation's thought on every important subject that has occurred within the span of time that it embraces.

JAMES JAY PLEASANTS, JR.

HANDBOOK OF BANKRUPTCY LAW. By Henry Campbell Black. St. Paul: The West Publishing Co., 1930. Pp. xvi, 905.

As stated by the author in his first edition of this work, published in 1924, "The object of this work is to present to the general practitioner and to students and instructors in the law schools a convenient and useful compendium of the principles of the law and practice in Bankruptcy, now fairly well settled, arranged according to the admirable plan of the Hornbrook Series. Minute discussions of minor problems, long lists of cases supporting rules which are no longer disputed, and excursions into endless ramifications of general principles as applied to an infinite variety of facts, have obviously no place in such a book. Yet it is believed that no important principle has been omitted or inadequately treated." This second edition is modeled after the first, with the same general scheme in view. A statment of the leading principles of law appear in black-letter type, followed by a more extended commentary, elucidating the principles. Notes and authorities are found at the bottom of each page.

However, since the writing of the first edition, there have been many important amendments to the Bankruptcy Law which have materially affected both the principles of substantive law and procedure in bankruptcy cases and proceedings. The Act of February 13, 1925, amended various sections of the Judicial Code; that of May 27, 1926, amended those relating to bankruptcy courts, acts constituting acts of bankruptcy, compositions, discharge, time within which claims must be proved, and priorities; that of January 31, 1928, and amendment of April 26, 1928, abolished writs of error in the Federal Courts, substituting therefor relief by appeal only. Each of these statutes has been appropriately incorporated into this edition. They are as much a part of the bankruptcy law as the statute enacted in 1898, and knowledge of their effect is essential both to the students and practitioners of the law at the present time.

As explained by the publisher, the majority of the annotations fall within the scope of those contained in the first edition, and this because, the text of the amendatory law being so recent, the question of its construction by the courts remains largely a matter for the future.

The table of contents completely outlines the thirty-four chapters and three hundred and seven sections taken up in this book. Each chapter deals with some particular phase of the Bankruptcy Law or Procedure; each section with some leading principle. Immediately following the table of contents there appears a table showing the disposition in title 11, United States Code Annotated, of the sections of the Bankruptcy Act of July 1, 1898, as amended to date. The Bankruptcy Act, the General Orders in Bankruptcy, and the

Official Forms have been included as an appendix. All repealed matter has been stricken out and all amendments have been incorporated, including that of January 13, 1930.

This is a concise, systematic, and complete text book on bankruptcy law and should be of great value especially to those students of Bankruptcy Law of today.

C. M. SWANGO, JR.

CASES ON AIR LAW. By Carl Zollmann. St. Paul: West Publishing Co., 1930. Pp. xii, 520.

The author has treated this very immature subject from two broad viewpoints, that of aviation and of radio. The rapid growth of both of these fields merits the appraisement of the developments which have been made and the laws concerning them. In the first chapter there are cases given illustrative of air space rights, the author giving as his first case the well known suit of *Johnson v. Curtis Northwest Airplane Co.* Maritime analogies follow next, and the same criticism can be leveled at this chapter as was directed at "A Treatise on Aviation Law" in that the familiar case of *Crawford Bros.* No. 2; 215 Fed. 269, is cited for the proposition that a hydroplane is not within the jurisdiction of admirality, though there is nothing in the report of the case to suggest that the craft was anything other than an ordinary airplane, indicating hasty preparation. There are cases on airports and airways, negligence by owner of aviation field, liability of a pilot, insurance, common carriers, workmen's compensation acts, criminal law, contracts, air mail service, and lien on airplanes. The part devoted to aviation should be helpful in commanding the holdings and opinions of the courts on this subject and the subjects related.

A history, with the construction and the constitutionality of the Radio Act of 1912, is outlined with cases illustrative and is taken up in part two. The law in regard to ownership of and the control over radio sending stations, torts, criminal phases, contracts, copyrights, unfair practices, and static is next presented. The Air Commerce Act of 1926, and the Federal laws governing air craft procurement and control are briefly reviewed, also The Uniform State Law of Aeronautics, and the recent Radio Act of 1927. There is a brief index at the end of the book which will aid in its use. The book can hardly be called a case book, but is perhaps the best of its type which has yet been written and should be of use to those who have a limited library.

T. P. BRADY.

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HOW TO CONDUCT A CRIMINAL CASE. By William Harman Black. New York: Prentice-Hall, Inc., 1929. Pp. xxvii, 387.

HANDBOOK OF BANKRUPTCY LAW. By Henry Campbell Black. St. Paul: West Publishing Co., 1930. Pp. xv, 852.

FAMOUS SPEECHES BY EMINENT AMERICAN STATESMEN. By Frederick C. Hicks. St. Paul: West Publishing Co., 1929. Pp. xi, 962.

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